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INTRODUCTION

The New York Course Materials ("Course Materials") address select topics related to the New York court system, administrative law, business relationships, civil practice and procedure, conflict of laws, contracts, criminal law and procedure, evidence, matrimonial and family law, professional responsibility, real property, torts and tort damages, and trusts, wills and estates. Unless otherwise noted, the Course Materials are intended to summarize general aspects of these topics and may not include all details or exceptions to the general rules. The information contained in the Course Materials is not legal advice and should not be used as legal advice. The Course Materials, as well as the New York Law Course itself, are periodically revised and copyright protected. Please ensure that you are using the most recent version in preparing for the New York Law Exam.

THE NEW YORK COURT SYSTEM

I. Principal Appellate Courts

A. Court of Appeals: NY Const, art VI, § 3

The Court of Appeals is the highest court in the court system. It has no original jurisdiction and exercises only appellate jurisdiction in criminal cases and in civil cases without regard to the amount in controversy. Its jurisdiction is generally limited to questions of law.

B. Appellate Division of Supreme Court - First, Second, Third and Fourth Judicial Departments (*See* Appendices A, B): NY Const, art VI, § 4

The Appellate Division is a single statewide appellate court, divided into four judicial departments, and is the principal intermediate appeals court for both criminal and civil cases. Pursuant to the doctrine of stare decisis, trial courts in a given department are required to follow precedent set by the Appellate Division for another department until the Court of Appeals or the Appellate Division for the department in which the trial court sits pronounces a contrary rule. Each department of the Appellate Division should accept the decisions of its sister departments as persuasive authority but is free to reach a contrary result (*Mountain View Coach Lines, Inc. v Storms*, 102 AD2d 663 [2d Dept 1984]).

C. Appellate Terms of the Supreme Court: NY Const, art VI, § 8

Appellate Terms of the Supreme Court exist in the First Judicial Department (consisting of two counties within New York City) and Second Judicial Department (consisting of three counties within New York City and seven other counties) (*See* Appendix A). The Appellate Terms of both the First and Second Departments hear appeals from the Civil Court of New York City, and the Appellate Term of the Second Department also hears appeals from district, county, city, town, and village courts.

II. Principal Trial Courts

A. Supreme Court: NY Const, art VI, § 7; CPL 10.20; *People v Correa,* 15 NY3d 213 (2010)

Supreme Court has general original jurisdiction of all cases in law and equity without monetary limitation unless its jurisdiction has been specifically proscribed. In some cases its jurisdiction is concurrent with that of other courts. It has exclusive subject matter jurisdiction over matrimonial actions and wrongful death claims.

The Commercial Division of Supreme Court handles claims meeting a minimum monetary threshold and involving a multitude of commercial disputes (22 NYCRR 202.70 [a], [b]). Shortly after commencement of an action, any party may seek assignment of its case to the Commercial Division, and upon transfer the parties are subject to the specific rules of practice for the Commercial Division (*See* 22 NYCRR 202.70 [g]). The rules address, among other matters, electronic submission and form of papers, attorney appearances, limitations on discovery, discovery of electronically stored information, adherence to discovery schedules, discovery disputes, motions, and trials.

Supreme Court, as a court of general jurisdiction, can exercise jurisdiction over all criminal proceedings. In practice, the only criminal jurisdiction it exercises is over felonies in New York City and in Domestic Violence or Integrated Domestic Violence Parts anywhere in New York (*See* Matrimonial and Family Law, VI.).

B. Court of Claims: NY Const, art VI, § 9; Court of Claims Act

The Court of Claims has exclusive jurisdiction over tort and contract claims against the State of New York. The Court of Claims may not exercise equitable jurisdiction, does not have jurisdiction over non-state actors, and does not permit jury trials.

C. County Court: NY Const, art VI, § 11; Judiciary Law art 7; Mental Hygiene Law § 81.04; CPL 10.20

County Courts exist in all counties outside of New York City. The jurisdiction of a County Court includes:

> Actions and proceedings to recovery money where (1) the amount sought to be recovered does not exceed $25,000 and (2) one of the following applies: (a) every defendant resides in the county, (b) a defendant has an office for transaction of business within the county and the cause of action arose in the county, or (c) the defendant is a foreign corporation doing business within the county and the cause of action arose in the county.
>
> Various actions and proceedings involving real property located within the county, without regard to any dollar amount or contacts of defendants to the county, including summary proceedings for eviction and actions and proceedings:
>
> - For the partition of real property,
> - For the foreclosure of a mortgage,
> - For specific performance of a contract,
> - For the enforcement or foreclosure of a mechanic's lien,
> - For reformation or rescission of a deed, contract or mortgage, and
> - To compel the determination of a claim to real property under Article 15 of the Real Property Actions and Proceedings Law.
>
> Guardianship proceedings under Article 81 of the Mental Hygiene Law (Mental Hygiene Law § 81.04).
>
> County Courts have jurisdiction over all criminal matters but primarily hear felonies.

County Courts in the Third and Fourth Departments also have jurisdiction over appeals from any of the district, city, town, and village courts within the county in both civil and criminal proceedings.

D. Surrogate's Court: NY Const, art VI, § 12; Surrogate Court Procedure Act (SCPA) art 2; Domestic Relations Law, art VII

Surrogate's Court has jurisdiction over all proceedings relating to the probate of wills, administration of estates, lifetime trusts, and guardianship of the property of minors. It also has concurrent jurisdiction with the Family Court over adoptions. Although a wrongful death action may not be brought in Surrogate's Court, Surrogate's Court has concurrent jurisdiction over the allocation and distribution of the proceeds of a wrongful death action (EPTL 5-4.4 [a] [1]). Surrogate's Court has full equity powers in matters over which it has jurisdiction.

E. Family Court: NY Const, art VI, § 13; Family Court Act (FCA)

Family Court has jurisdiction over child abuse and neglect proceedings, proceedings to determine paternity, proceedings for the permanent termination of parental rights, person-in-need-of-supervision (PINS) proceedings, family offense proceedings (concurrent and simultaneous with the criminal courts), juvenile delinquency proceedings (*See* Matrimonial and Family Law, VIII.), adoptions, and dependent support proceedings.

Family Court Act 411 confers upon Family Court "exclusive original jurisdiction over proceedings for support or maintenance"[1] but its jurisdiction does not extend to proceedings for child or spousal support while an action for divorce is pending (N.Y. Const, art. VI, § 13 [b] [4]; *Matter of Roy v Roy,* 109 AD2d 150, 152 [3d Dept 1985]). Supreme Court as a court of general original jurisdiction has exclusive jurisdiction over matrimonial actions (N.Y. Const, art VI, § 7; *Seitz v Drogheo,* 21 NY2d 181, 211 [1967]; *see* Civil Practice and Procedure, I.B.) and concurrent jurisdiction with Family Court over support matters. Both Supreme Court and Family Court have concurrent post-divorce jurisdiction and may enforce or modify an underlying support order issued by Supreme Court.

III. Other Courts

A. New York City Civil Court: NY Const, art VI, § 15; New York City Civil Court Act arts 2, 18

The New York City Civil Court has jurisdiction within the City of New York over actions and proceedings for the recovery of money where the amount sought to be recovered does not exceed $50,000.

The Civil Court includes the Housing Court, which handles actions and proceedings involving landlords and tenants and housing and building code violations, without regard to any dollar amount, including summary proceedings for eviction, and various actions and proceedings related to state and local housing standards.

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[1] Technically, the Supreme Court, because it constitutionally has general jurisdiction of all cases, may assert unfettered concurrent jurisdiction over child or spousal support, but it rarely, if ever, entertains a child support or spousal support matter, except in the context of a matrimonial proceeding.

The Civil Court also has a small claims part for handling monetary actions of $10,000 or less with simplified procedures.

B. New York City Criminal Court: NY Const art VI, § 15; New York City Criminal Court Act § 31

The New York City Criminal Court has criminal jurisdiction within the City of New York over misdemeanors and violations.

C. District, city, town, and village justice courts: NY Const, art VI, §§ 16, 17; Uniform District Court Act arts 2, 18; Uniform City Court Act arts 2, 19; Uniform Justice Court Act arts 2, 18; CPL 10.30

District courts (established only in Nassau and Suffolk Counties located in the Second Judicial Department) and city courts outside of New York City have jurisdiction over actions and proceedings involving matters within the boundaries of the county or city basically the same as that of the New York City Civil Court, including housing matters, except that any applicable statutory dollar limitation is $15,000.

Town and village justice courts have jurisdiction over actions and proceedings for the recovery of money or chattels where the amount sought to be recovered or the value of the property does not exceed $3,000, and over summary proceedings for eviction.

All of these courts also have small claims parts with simplified procedures for handling monetary actions considered “small claims” (maximum of $10,000 for city courts, $5,000 for district courts, and $3,000 for town and village courts).

In criminal matters, district, city, town, and village courts have preliminary jurisdiction of all offenses and trial jurisdiction of misdemeanors and violations.

ADMINISTRATIVE LAW

I. Rulemaking

A. Power to make

Under the separation-of-powers doctrine, the legislature cannot delegate its lawmaking power to an administrative agency. However, the legislature may endow administrative agencies with the power to fill in the gaps in the legislative product by prescribing rules and regulations consistent with the enabling legislation (*Nicholas v Kahn*, 47 NY2d 24 [1979]). There does not need to be a specific and detailed legislative expression authorizing a particular administrative act, as long as the basic policy decision has been articulated by the legislature, the administrative rule or regulation is not inconsistent with the statutory language or its underlying purpose, and the administrative agency is not engaging in broad-based policy determinations (*Gen. Elec. Capital Corp. v New York State Div. of Tax Appeals,* 2 NY3d 249 [2004]).

B. Statutory procedures: State Administrative Procedure Act (SAPA) 201, 202, 203

An agency rule or regulation must be enacted in substantial compliance with the procedural requirements of SAPA 202. Prior to the adoption of a rule, an agency must submit notice of the proposed rule to the Secretary of State for publication in the State Register and afford the public an opportunity to submit written comments on the proposed rule. The notice must include, among other information: a statement of the statutory authority for the rule; a complete text of the proposed rule or, if the rule exceeds a certain length, a description of the rule and the website address where the full text is posted; a regulatory impact statement and flexibility analysis; and the date, time and place of any public hearings (SAPA 202 [1] [f]). A public hearing is not required before the adoption of a rule unless a statute specifically requires a hearing (*Rochester Gas and Elec. Corp. v Public Service Commission of State of NY,* 71 AD2d 185, 191 [3d Dept 1979]).

Except for emergency rules and certain other specified rules, a rule is not effective until it is filed with the Secretary of State and the notice of adoption is published in the State Register (SAPA 203). The notice of adoption must contain information similar to that required in the notice of the proposed rule and must also include the effective date of the rule and an assessment of the public comments received on the rule (SAPA 202 [5]).

II. Publication of Rules

A. New York Codes, Rules and Regulations (NYCRR): Executive Law § 102 (5)

The NYCRR is a published compilation of the rules and regulations of all state agencies (Executive Law § 102 [5]).

B. The State Register (*See* Administrative Law, I.B.)

III. Adjudication

A. Definition, basic requirements: SAPA 102, SAPA art 3, 301, 302, 303, 304, 305, 306, 307

An adjudicatory proceeding is defined as any activity, other than rule-making or employee discipline, in which a determination is required by law to be made only on the record and after a hearing (SAPA 102 [3]). If the relevant enabling statute specifies a hearing on the record, then SAPA demands an adjudicatory proceeding and all of the procedures of Article 3 are mandatory upon the agency (*Gruen v Chase*, 215 AD2d 481 [2d Dept 1995]). The agency must provide a party with a hearing on the record before an impartial officer having the power to administer oaths and issue subpoenas; it must keep a complete record of the proceeding; and the final determination must be in writing and include findings of fact and reasons for the decision (SAPA 301, 302, 303, 304, 307).

B. Due process requirements: SAPA 301

A party to an administrative proceeding must be afforded the due process protections of the Fourteenth Amendment and the New York State Constitution, i.e., a short and plain statement of the matters asserted, an opportunity for a hearing within a reasonable time, reasonable notice of such hearing, and an opportunity to present written argument on issues of law and evidence on issues of fact (SAPA 301). However, not all of the elements of due process required for a criminal proceeding are required for an administrative adjudicatory proceeding. For example, unlike the specificity requirements of an indictment in a criminal proceeding, the due process required in an administrative proceeding for a charge of misconduct is that the charge need only be reasonably specific, in light of all the relevant circumstances, to apprise the party whose rights are being determined of the charges against him or her and to allow for the preparation of an adequate defense (*Block v Ambach*, 73 NY2d 323 [1989]).

C. Discovery: SAPA 305

Discovery in an administrative proceeding is not governed by the CPLR. Each agency may adopt rules for discovery and depositions to the extent and in the manner appropriate to its proceedings, and the parties to the proceeding are subject to these rules (SAPA 305).

D. Hearing, rules of evidence, burden of proof, and right to counsel: SAPA 306, 501

The formal rules of evidence contained in the CPLR do not apply to administrative hearings, but rules of privilege do, and a party has the right to cross-examination (SAPA 306). Except as otherwise provided by statute, the burden of proof is on the party who initiates an administrative proceeding (SAPA 306). All persons appearing at the hearing are accorded the right to be accompanied, represented and advised by counsel (SAPA 501).

E. Res judicata and collateral estoppel effect

These doctrines are generally applicable to quasi-judicial administrative determinations that are made pursuant to the adjudicatory authority of an agency employing procedures substantially similar to those used in a court of law (*Ryan v New York Tel. Co.,* 62 NY2d 494 [1984]). However, where a party is a nominal party or did not have a full and fair opportunity to litigate the material issue before the agency, the doctrines will not be applied (*Matter of Sherwyn Toppin Mktg. Consultants, Inc. v New York State Liq. Auth.,* 103 AD3d 648 [2d Dept 2013]).

F. Agency power to acquire information

1. Administrative investigations

Administrative agencies may exercise those powers expressly authorized by their enabling statutes, including the power to conduct administrative investigations (*Matter of Shankman v Axelrod*, 73 NY2d 203, 206 [1989]). Agencies have the ability in furtherance of an investigation to issue subpoenas to compel the attendance of witnesses or the production of evidence. In order to justify a subpoena issued in furtherance of an investigation, the agency must make a preliminary showing that the information sought in the subpoena is reasonably related to a proper subject of inquiry and that there is some basis for inquisitorial action (*Levin v Murawski,* 59 NY2d 35 [1983]).

2. Administrative subpoenas: SAPA 304; CPLR 2302, 2304

Officers presiding at administrative hearings are authorized to issue subpoenas at the request of any party (SAPA 304). Statutes governing adjudicatory proceedings before particular agencies may independently confer subpoena power, and if there is a specific statutory grant, the agency's power to issue subpoenas is derived solely from such grant (*Matter of Irwin v Board of Regents*, 27 NY2d 292 [1970]). In the absence of a statutory grant of subpoena power, agencies and attorneys of record for any party to the proceeding are granted the general subpoena power afforded courts and attorneys under CPLR 2302. A request to withdraw or modify a subpoena must first be made to the person who issued it, and motions to quash or enforce administrative subpoenas are not part of the hearing process and must be made in supreme court (CPLR 2304).

IV. Judicial Review

A. Preconditions to judicial review

1. Standing

Judicial review is available to persons who have suffered an unfavorable administrative decision and those that have a stake in the outcome of the administrative process, but whose injury is less direct. There is a two-step test for evaluating standing claims: (1) a party must show some harmful effect, whether economic or non-economic, and (2) the interest sought to be protected must be arguably within the zone of interest to be protected by the statute under which the agency has acted (*New York State Assn. of Nurse Anesthetists v Novello*, 2 NY3d 207, 211 [2004]).

2. Exhaustion of administrative remedies

A party must attempt to obtain whatever administrative relief might be available before proceeding to the courts. This includes utilizing procedures for both administrative hearings and internal administrative appeals. The major exceptions are agency actions that are challenged as either unconstitutional or wholly beyond the agency's grant of power or when resort to an administrative remedy would be futile or its pursuit would cause irreparable injury (*Watergate II Apartments v Buffalo Sewer Auth.,* 46 NY2d 52, 57-58 [1978]). However, unless the claim is that the underlying statute is unconstitutional in its entirety, the mere assertion of a violation of a constitutional right does not always avoid the requirement to exhaust administrative remedies. If a constitutional claim hinges on factual issues, the necessary record must be established at the administrative level (*Schulz v State*, 86 NY2d 225 [1995]). And if the underlying statute provides an exclusive administrative remedy, the futility and irreparable injury exceptions do not apply (*Bankers Trust Corp. v N.Y. City Dep't of Fin.*, 1 NY3d 315 [2003]).

3. Ripeness, finality: CPLR 7801

If a party to an administrative adjudication pursues all avenues of relief open within the agency without a satisfactory result, the administrative determination is final and ripe for judicial review (CPLR 7801 [1]). An administrative agency action is final and ripe for review if it imposes an obligation, denies a right or fixes some legal relationship as a consummation of the administrative process, resulting in an actual, concrete injury (*Essex County v Zagata*, 91 NY2d 447 [1998]).

However, a determination that is interlocutory in nature may be reviewable if there are extraordinary circumstances (*e.g., Doe v. Axelrod*, 71 NY2d 484 [1988]).

4. Statute of limitations: CPLR 217

Unless a shorter time is provided in the law authorizing the proceeding, a proceeding against a body or officer must be commenced within four months after the determination to review becomes final and binding upon the petitioner (CPLR 217; *see* Civil Practice and Procedure, V.A.).

B. Review of agency actions

1. Procedural basis of review: CPLR Art 78, declaratory judgment action

Article 78 of the CPLR provides the judicial proceeding and procedure used to challenge agency determinations (*See* Civil Practice and Procedure, X.B.). Proceedings under Article 78 are special proceedings, subject to specific procedural requirements (CPLR 7804). Actions for declaratory judgment under CPLR 3001 may be used to challenge agency actions that are not reviewable under Article 78, including challenges to agency rulemakings (SAPA 205). An action for declaratory judgment is generally not subject to the procedural strictures of Article 78.

2. Determinations of law

Judicial review of administrative actions pursuant to Article 78 is limited to questions of law (*Khan v. N.Y. State Dep't of Health*, 96 NY2d 879 [2001].

A court's review of an agency's interpretation of a statute is limited. New York administrative agencies are entitled to deference in matters of statutory interpretation of legislation governing the agency and in issuing decisions within the agency's own special expertise (*Matter of Gruber* [*New York City Dept. of Personnel - Sweeny*], 89 NY2d 225 [1996]). The standard of review is whether an agency's decision is supported by a rational basis (*Id.*) or was affected by an error of law or was arbitrary and capricious or an abuse of discretion (CPLR 7803 [3]; *Matter of Incorporated Vil. of Lynbrook v New York State Pub. Empl. Relations Bd.,* 48 NY2d 398, 404-405 [1979]).

However, if the question is one of pure statutory reading and analysis, dependent only on accurate apprehension of legislative intent, there is little basis to rely on any special competence or expertise of the administrative agency, and its interpretive regulations are therefore to be accorded much less weight. If the regulation runs counter to the clear wording of a statutory provision, it should not be accorded any weight (*Kurcsics v Merchants Mut. Ins. Co*., 49 NY2d 451, 459 [1980]).

3. Findings of fact: SAPA 307; CPLR 7803

Determinations of fact made after a formal adjudicatory hearing where evidence is taken must be made on the record as a whole and be supported by substantial evidence (SAPA 307 [1]; CPLR 7803 [4]). Although specific findings of fact are beyond judicial review, whether an administrative agency determination is supported by substantial evidence is a question of law (*300 Gramatan Ave. Assoc. v State Div. of Human Rights,* 45 NY2d 176, 181 [1978]). Substantial evidence means such relevant proof as a reasonable mind may accept as adequate to support a conclusion (*Ridge Road Fire Dist. v Schiano*, 16 NY3d 494 [2011]); *Matter of Miller v DeBuono*, 90 NY2d 783 [1977]). It is a lesser standard than a preponderance of the evidence or evidence beyond a reasonable doubt (*300 Gramatan Ave. Assoc. v State Div. of Human Rights,* 45 NY2d 176, 180-181 [1978]).

In reviewing agency determinations involving findings of fact made without a formal adjudicatory hearing being required by statute or law, the court must determine whether there is a rational basis for the determination or if it was arbitrary and capricious (*Colton v Berman*, 21 NY2d 322 [1967]). Once the court determines a rational basis exists for an agency's determination, its review is ended (*Matter of Sullivan County Harness Racing Assn. v Glasser*, 30 NY2d 269, 277-278 [1972]).

4. Discretionary determinations

An agency's discretionary acts and policy decisions may be set aside only if there is no rational basis for the exercise of discretion and the act complained of is arbitrary and capricious (*Peckham v Calogero*, 12 NY3d 424 [2009]). An action is arbitrary and capricious if it is "taken without sound basis in reason or regard to the facts" (*Id.* at 431).

Administrative disciplinary penalties may be set aside only if such punishment constitutes an abuse of discretion (CPLR 7803 [3]). The penalty must be upheld unless it is so disproportionate to the offense in light of all the circumstances as to shock one's sense of fairness (*Matter of Pell v Board of Educ. of Union Free School Dist No 1 of Towns of Scarsdale & Mamaronek, Westchester County,* 34 NY2d 222, 232-233 [1973]).

V. Public Disclosure

A. Freedom of Information Law (FOIL): Public Officers Law §§ 86, 87, 88

Every "agency" (defined very broadly as "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature")(Public Officers Law § 86) must make available for public inspection and copying all records, except those records or portions thereof that fall within certain enumerated exceptions (Public Officers Law § 87). Access to governmental records under FOIL does not depend on the purpose for which the records are sought (*Matter of Gould v New York City Police Dept.,* 89 NY2d 267, 274 [1966]).

B. Open Meetings Law: Public Officers Law §§ 103, 105, 108

The Open Meetings Law requires public bodies (excepting judicial or quasi-judicial proceedings and political committees) to conduct all portions of any meeting in venues open to the general public to the extent set forth in the statute, on reasonable advance notice to the public, unless the public body calls an executive session (Public Officers Law §§ 103, 108). An executive session may be called only by a motion on majority vote of the public body in public session, and the motion must identify the general topics to be discussed in the executive session (Public Officers Law § 105). The permitted topics include matters which will imperil the public safety if disclosed; matters involving law enforcement and criminal investigations which would imperil effective law enforcement if disclosed; discussions regarding proposed, pending or current litigation; collective negotiations with employees; the medical, financial, or employment history of individuals or matters leading to their appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal; the preparation, grading, or administration of exams; and the proposed sale or lease of real property or the proposed sale or acquisition of securities when publicity would substantially affect the value of such property.

C. Reporting and recordkeeping requirements: Public Officers Law § 106

Minutes must be taken at all open meetings (including executive sessions), must include all matters voted upon, and must be made available to the public under FOIL (Public Officers Law § 106).

BUSINESS RELATIONSHIPS

Business Corporations, Limited Liability Companies and Partnerships

BUSINESS CORPORATIONS

I. Formation and Nature

A. Certificate of incorporation: Business Corporation Law (BCL) 402, 408

Formation of a corporation under the BCL requires the filing of a certificate of incorporation with the Secretary of State containing certain detailed information, including the corporate name, the corporate purpose (which may be "to engage in any lawful activity"), the county where the office is to be located, specific information about the shares authorized to be issued, the duration of the corporation if other than perpetual, designation of the Secretary of State as agent for service of process, and, if desired, designation of a registered agent (BCL 402 [a]). Every corporation must file biennially a statement confirming, among other information, the address of its principal office and address for service of process (BCL 408).

B. Corporate name: BCL 301

The name of a business corporation generally must contain the word "corporation", "incorporated" or "limited", or an abbreviation of one of such words (BCL 301 [a] [1]). Some phrases and many words are not permitted in corporate names or are permitted only with the consent of a particular state agency (BCL 301 [a] [3] – [11]). For example, "insurance" may not be used without the approval of the superintendent of financial services and "school" may not be used without the approval of the commissioner of education, which approval must be attached to the certificate of incorporation.

C. Adoption, amendment and repeal of by-laws: BCL 601

The initial by-laws are adopted by the incorporator or incorporators at an organizational meeting. Any by-law adopted by the incorporators is considered to be a by-law adopted by the shareholders. The by-laws may contain any provisions relating to the business of the corporation, the conduct of its affairs, and its rights and powers and those of its shareholders. Adoption, amendment or repeal of by-laws requires a majority vote of shareholders or, if provided in the certificate of incorporation or a by-law adopted by the shareholders (including any by-law adopted by the incorporators), by requisite vote of the board of directors (BCL 601).

D. Business Corporation Law revision

The Business Corporation Law was substantially revised effective February 22, 1998, and now includes some provisions which are different for corporations depending on whether they were in existence on February 22, 1998, or formed after that date.

II. Management and Control

A. Shareholders

1. Voting: BCL 612, 614, 803, 909

Every shareholder is entitled to one vote for every share standing in his or her name on the record of shareholders, unless otherwise provided in the certificate of incorporation (BCL 612 [a]). Any corporate action, other than the election of directors (*See* Business Relationships, Business Corporations, B.1.), taken by a vote of the shareholders, generally requires a majority of the votes cast at a meeting of shareholders by the holders of shares entitled to vote thereon, unless otherwise provided by statute, the certificate of incorporation or a by-law adopted by the shareholders (BCL 614 [b]). Statutory exceptions include the following:

Approval of an amendment to the certificate of incorporation (BCL 803 [a]) and authorization of a shareholders' petition for judicial dissolution (BCL 1103 [c]) require the vote of a majority of all outstanding shares entitled to vote thereon.

Approval of a merger or consolidation (BCL 903 [a] [2]), approval of any sale, lease, exchange or other disposition of all or substantially all of the assets of the corporation, if not made in the usual or regular course of the business actually conducted by the corporation (BCL 909 [a] [3]), and authorization of a non-judicial dissolution (BCL 1001 [a]) require:

> For corporations incorporated after February 22, 1998, or whose certificates of incorporation expressly so provide, a majority of the votes of all outstanding shares entitled to vote thereon.
>
> For other corporations in existence on February 22, 1998, two-thirds of the votes of all outstanding shares entitled to vote thereon.

Except as otherwise provided in the certificate of incorporation or a by-law adopted by the shareholders, an abstention shall not constitute a vote cast (BCL 614 [b]).

2. Action by shareholders without a meeting: BCL 615

In lieu of voting at a meeting, any action by shareholders may be taken without a meeting on written consent, setting forth the action so taken, signed by the holders of all outstanding shares entitled to vote thereon or, if the certificate of incorporation so permits, signed by the holders of outstanding shares having not less than the minimum number of votes that would be necessary to authorize or take such action at a meeting at which all shares entitled to vote thereon were present and voted (BCL 615 [a]).

3. Dissolution based on deadlock: BCL 1104

The holders of 50% or more of the outstanding voting shares of a business corporation may seek dissolution of the corporation on the grounds that: (1) the directors are so divided respecting the management of the corporation's affairs that the votes required for board action cannot be obtained; or (2) the shareholders are so divided that the votes required for the election of directors cannot be obtained; or (3) there is internal dissension, and two or more factions of shareholders are so divided that dissolution would be beneficial to the shareholders (BCL 1104).

4. Minority shareholder's right to petition for judicial dissolution: BCL 1104-a

The holders of 20% or more of the outstanding shares of a business corporation, which is not a registered investment company and no shares of which are publicly traded, may seek dissolution of the corporation on the grounds that: (1) the directors have been guilty of illegal, fraudulent or oppressive actions toward the complaining shareholders; or (2) the assets of the corporation are being looted, wasted or diverted for non-corporate purposes by its directors or officers or those in control. The court in determining whether to involuntarily dissolve the corporation must consider whether liquidation is the only feasible means for a shareholder to obtain a fair return and whether liquidation is reasonably necessary for the protection of the rights of any substantial number of shareholders (BCL 1104-a).

5. Right to dissent and be paid for shares ("appraisal rights"): BCL 623, 806, 910

New York gives any dissatisfied shareholder of a business corporation who dissented from certain types of corporate action – a minimum ownership interest is not required – appraisal rights, specifically, the right to petition the courts to receive payment of the fair cash value of his or her shares. The purpose is to allow a corporation to proceed with an action it views as beneficial, while protecting the rights of dissenting shareholders.

In particular, BCL 910 entitles a shareholder of a domestic corporation to appraisal rights if the shareholder opposed a plan of merger or consolidation to which the corporation is a party, subject to certain enumerated exceptions, including where the shareholder's shares are publicly traded. Appraisal rights are also available to a shareholder who opposed the transfer or disposition of all or substantially all of the assets of a corporation not in the regular course of business, other than a transaction for cash in combination with the dissolution of the selling company.

Additionally, BCL 806 entitles a shareholder to appraisal rights if the shareholder opposed an amendment to the certificate of incorporation that after the amendment was adopted adversely affected any of the shareholder's rights, including preferential rights, redemption rights, preemptive rights, and voting rights.

Shareholders claiming appraisal rights must follow the procedures and time limits contained in BCL 623. The statute is extremely long with many detailed nuances, but the most basic procedures are as follows: prior to the vote being taken on the proposed corporate action, the shareholder must file a written objection to the action, including a demand for payment of the fair value of his or her shares if the corporate action is taken. Upon consummation of the corporate action, the corporation must timely make a written offer to each shareholder who has filed a notice of election to dissent to pay for his or her shares at a specified price, which the corporation considers to be their fair value. If the corporation fails to make a timely offer of payment, or if the dissenting shareholder fails to agree with the price specified in the offer, the corporation may initiate a special proceeding to fix the fair value of their shares; if it fails to do so, the shareholder may initiate the proceeding.

B. Directors

1. Number, election and removal: BCL 614, 702, 706

A board of directors may consist of one or more members (BCL 702). In the absence of a controlling provision in the by-laws or certificate of incorporation, which may, for example, provide for cumulative voting (BCL 618), directors are elected by a plurality of the votes cast at a meeting of shareholders by the holders of shares entitled to vote in the election (BCL 614 [a]). Directors may be removed by vote of the shareholders for cause, and if the certificate of incorporation or by-laws so provide, without cause (BCL 706).

2. Quorum and voting: BCL 707, 708, 709

A majority of the entire board constitutes a quorum for the transaction of business, except that the certificate of incorporation or the by-laws may fix the quorum at less than a majority but not less than one-third (BCL 707), and the certificate of incorporation may fix the quorum at more than a majority for the transaction of all, or any specified item of, business (BCL 709 [a] [1]).

Board action requires the majority vote of the directors present at the time of the vote provided a quorum is present (BCL 708 [d]), except that the certificate of incorporation may provide that a greater proportion of votes shall be necessary for the transaction of all, or any specified item of, business (BCL 709 [a] [2]).

Unless otherwise restricted by the certificate of incorporation or the by-laws, directors may participate in a meeting by means of a conference telephone or similar communications equipment allowing all persons participating in the meeting to hear each other at the same time, and such participation constitutes presence at the meeting (BCL 708 [c]).

3. Action by directors without a meeting: BCL 708

Unless otherwise restricted by the certificate of incorporation or the by-laws, action by the board may be taken without a meeting if all members of the board consent in writing to the adoption of a resolution authorizing the action (BCL 708 [b]). Such written consent may be made electronically if accompanied by information from which it can be reasonably determined that the transmission was authorized by the member (*id.*).

4. Interested directors: BCL 713

BCL 713 provides that a contract or transaction between a corporation and one of its directors, or any other business entity in which a director is also a director or officer or has a substantial financial interest, is not void or voidable by reason alone of the director’s interest or by reason alone that such director is present at the meeting of the board which approves such contract (the interested director may be counted to establish a quorum) or that such director's votes are counted for such purpose if:

- The material facts as to such director's interest in such contract or transaction and as to any such common directorship, officership or financial interest are disclosed in good faith or known to the board, and the board approves such contract or transaction by a vote sufficient for such purpose without counting the vote of such interested director, or, if the votes of the disinterested directors are insufficient to constitute an act of the board, by unanimous vote of the disinterested directors; or

- If the material facts as to such director's interest in such contract or transaction and as to any such common directorship, officership or financial interest are disclosed in good faith or known to the shareholders entitled to vote thereon, and such contract or transaction is approved by vote of such shareholders.

If an interested director contract or transaction is not approved as stated above, the contract or transaction is still not voidable if the party or parties establish affirmatively that the contract or transaction was fair and reasonable to the corporation at the time it was approved by the board or shareholders.

5. Loans to directors and guarantees of director obligations: BCL 714

For corporations formed after February 22, 1998, and for corporations formed before then if so provided in the certificate of incorporation, corporate loans may be made to directors and the corporation may guarantee director obligations if the board determines that the specific loan or guarantee benefits the corporation and either approves the specific transaction or has approved a general plan authorizing loans and guarantees (BCL 714). For all other corporations the specific transaction must be approved by a shareholder vote, in which a majority of the shares entitled to vote constitutes a quorum, but shares of directors who are benefited by the transaction may not vote or be included in the determination of a quorum (*Id.*).

C. Officers: election and removal: BCL 715, 716

Officers are typically elected by the board and may be removed by the board with or without cause (BCL 715, 716). If the certificate of incorporation permits, officers may be elected by shareholders instead of the board, and officers so elected may only be removed with or without cause by the vote of the shareholders, but an officer's authority to act as an officer may be suspended by the board for cause (*Id.*).

D. Duties and liabilities of shareholders, officers and directors

1. Statutory liabilities of shareholders, officers and directors: BCL 630, 719, 720

The ten largest shareholders of a corporation, which is not a registered investment company and no shares of which are publicly traded, are jointly and severally liable to its employees for all wages due them for services they performed for the corporation (BCL 630).

Directors are jointly and severally liable if they vote for or concur (a director is presumed to concur unless the director expressly dissents) in a declaration of dividends or purchase of shares contrary to BCL 513 or a loan to a director contrary to BCL 714 (BCL 719). There is a cause of action against a director or officer for self-dealing or loss or waste of corporate assets (BCL 720).

2. Ordinarily prudent person standard and business judgment rule: BCL 715, 717

Pursuant to the business judgment rule (BCL 715 [h], 717 [a]), officers and directors must perform their duties in good faith and with that degree of care which an ordinarily prudent person in a like position would use under similar circumstances. In performing this duty, they are entitled to rely on information, opinions, reports or statements, including financial statements and other financial data, in each case prepared or presented by:

- One or more other officers or employees of the corporation or of any other corporation of which at least 50% percent of the outstanding shares of stock entitling the holders thereof to vote for the election of directors is owned directly or indirectly by the corporation, whom the officer believes to be reliable and competent in the matters presented; or

- Counsel, public accountants or other persons as to matters that the officer believes to be within such person’s professional or expert competence, so long as in so relying the officer shall be acting in good faith and with such degree of care, but the officer shall not be considered to be acting in good faith if the officer has knowledge concerning the matter in question that would cause such reliance to be unwarranted.

In addition, a director is entitled to rely on information, opinions, reports or statements, including financial statements and other financial data, presented by a committee of the board upon which the director does not serve, as to matters within its designated authority, which committee the director believes to merit confidence, so long as in so relying the director shall be acting in good faith and with that degree of care which an ordinarily prudent person in a like position would use under similar circumstances, but a director shall not be considered to be acting in good faith if the director has knowledge concerning the matter in question that would cause such reliance to be unwarranted (BCL 717 [a] [3]).

An officer or director who so performs his or her duties shall have no liability by reason of being or having been an officer or director of the corporation (BCL 715 [h] [2], 717 [a] [3]).

III. Professional Service Corporations

A. Formation: BCL 1501, 1503, 1504, 1514

One or more individuals authorized by law to render the same professional service may form a professional service corporation (PC) for the purpose of providing that service (BCL 1503 [a]). A "profession" includes attorneys and counselors-at-law and the professions designated in Title 8 of the Education Law, such as medicine and public accountancy (BCL 1501 [b]).

All individuals forming a PC must be licensed to practice the same relevant profession, with the exception of certain professions that are statutorily exempt from this requirement (BCL 1503 [a]).

Formation of a PC requires the filing of a certificate of incorporation with the Secretary of State containing certain detailed information, including the profession or professions to be practiced and a list of the individuals who are to be its shareholders, directors and officers, all of whom must be licensed in the profession unless statutory exceptions apply (*Id.* at [b] [i], [h]). Certificates of authority issued by the licensing authority or authorities must accompany the filing of the formation documents (*Id.* at [b] [ii]). A PC may only render services through licensed individuals in the designated profession or professions, and plans, reports, transcripts, opinions and like documents generated by the corporation in rendering professional services must bear the signature of the licensed individual in charge of such document (BCL 1504). Every PC is required to file triennially a statement confirming, among other information, the name and address of each shareholder and certifying that they meet the requirements applicable to their profession with respect to the number of shareholders, directors and officers who must be licensed in the relevant profession (BCL 1514 [a]).

B. Name: BCL 1512

The name of a PC must end with the words "Professional Corporation" or the abbreviation "P.C.", and the name of a design professional service corporation must end with the words "Design Professional Corporation" or the abbreviation "D.P.C." (BCL 1512).

C. Professional relationships and liabilities: BCL 1505

Each shareholder, employee or agent of a PC, including a design professional corporation, is personally liable for any negligent or wrongful act or misconduct committed by him or her or any person under his or her direct supervision or control while rendering professional services on behalf of the corporation (BCL 1505 [a]). Such shareholders and other persons are not liable for the negligence of any other shareholder or person if they did not supervise them or personally participate in the questioned actions with them, nor are they responsible personally for contractual debts and obligations of the corporation Each shareholder and professional employee of a PC continues to be governed by the same professional regulatory and licensing authority applicable to the shareholder or employee prior to formation of the corporation (BCL 1505 [b]).

IV. Other Corporation Laws

Practitioners should be aware that corporations for certain specific purposes are formed under and regulated pursuant to other statutes (sometimes in conjunction with the BCL), including:

Banking Law – Corporations providing banking services, state-chartered banks, savings banks, trust companies, safe deposit companies and investment companies must be incorporated under the Banking Law.

Cooperative Corporations Law – Cooperative corporations are formed primarily for mutual help, not conducted for profit, in connection with services related to agricultural and food products, cooperative housing, certain medical services and indemnity, credit corporations, or other services delineated in the statute.

Education Law – Universities, colleges, libraries, museums and other educational institutions are incorporated by the board of regents.

Insurance Law – Insurance companies are incorporated by the superintendent of financial services.

Not-for-Profit Corporations Law – Most corporations formed other than for profit, including charitable, educational, religious, scientific, literary and cultural organizations, societies for the prevention of cruelty to children or animals, civic, patriotic, social and fraternal organizations and professional, commercial, industrial and trade associations are incorporated pursuant to this law.

Railroad Law – Corporations formed for the purpose of owning and operating a railroad are formed pursuant to the Railroad Law.

Religious Corporations Law – Religious corporations are incorporated under this law, which contains specific provisions regarding various religions.

Transportation Corporations Law – Gas and electric corporations, telegraph and telephone corporations, water-works corporations, ferry corporations, pipe line corporations, freight terminal corporations, district steam corporations and sewage-works corporations are formed pursuant to this law.

LIMITED LIABILITY COMPANIES

I. Formation

A. Articles of organization: Limited Liability Company Law § 203

Formation of a limited liability company (LLC) requires filing of articles of organization with the Secretary of State containing certain detailed information, including the company name, the county where the office is to be located, designation of Secretary of State as agent for service of process, and, if desired, designation of a registered agent (Limited Liability Company Law § 203 [e]). An LLC is formed at the time of filing the initial articles of organization or at any later date specified in the articles of organization (*Id.* at [d]). At the time of formation, an LLC must have at least one member (*Id.* at [c]). Every LLC is required to file biennially a statement confirming its address for service of process (Limited Liability Company Law § 301 [e] [1]).

B. Name: Limited Liability Company Law § 204

The name of a LLC must contain the words "Limited Liability Company or the abbreviation "L.L.C." or "LLC" (Limited Liability Company Law § 204 [a]). Other restrictions on words that may be included in the name are substantially the same as for business corporations (*Id.* at [d] - [i], *see* Business Corporations, I.B.).

C. Publication: Limited Liability Company Law § 206

The LLC must, in accordance with detailed statutory requirements, publish a copy of its articles of organization or a notice containing its substance in two newspapers (selected by the county clerk), in the county in which its principal office will be located, once a week over a period of six consecutive weeks, and it must file proof of such publication with the Secretary of State within 120 days following the effective date of the LLC registration. In the event of a failure to comply with the publication requirements, the authority of an LLC to conduct business within the state is suspended and the LLC is unable to maintain in its name any action or special proceeding; however, it does not preclude the LLC from defending any action or proceeding brought against it, impair the validity of any contract or other act of the LLC, impair the rights or remedy of any other party by virtue of any contract, act or omission of the LLC, or result in any member or manager of the LLC becoming liable for the LLCs contractual or other obligations (Limited Liability Company Law § 206).

II. Management

A. Operating agreement: Limited Liability Company Law § 417

The members of an LLC must adopt a written operating agreement, analogous to the by-laws of a business corporation or the partnership agreement of a partnership, before, at the time of, or within 90 days following the filing of the LLC's articles of organization, to be effective upon formation of the LLC or at such later time as provided in the operating agreement (Limited Liability Company Law § 417 [c]). The operating agreement may be amended from time to time, but no amendment may adversely affect various rights of a member without that member's consent (*Id.* at [b]).

B. By members or managers: Limited Liability Company Law §§ 401, 402, 408

LLCs may be managed by their members or by managers appointed or elected by the members. Unless its articles of organization provide that the LLC will be managed by managers, the LLC will be deemed to be managed by its members, in their capacity as members, with voting rights in proportion to their shares of the LLC profits (Limited Liability Company Law §§ 401, 402 [a]).

If the articles of organization provide for management by managers, such managers will hold offices and have responsibilities accorded them by members as provided in the operating agreement, and any action to be taken by a vote of the managers requires a majority vote (Limited Liability Company Law § 408).

C. Liabilities of members and managers: Limited Liability Company Law §§ 417, 609

Members and managers are generally not personally liable for debts and obligations of the LLC or each other, whether arising in contract or tort, solely by reason of being a member or manager (Limited Liability Company Law § 609 [a]). However, the ten members of a domestic LLC (or a foreign LLC if the unpaid services were performed in New York) with the largest percentage ownership interest are jointly and severally liable to its employees for wages for services they performed for the LLC (*Id.* at [c]).

The operating agreement may eliminate or limit the personal liability of managers to the LLC or its members for money damages arising from any breach of their duties but not for acts taken in bad faith, involving intentional misconduct or a knowing violation of law, or for pecuniary gain (Limited Liability Company Law § 417 [a]).

III. Professional Service Limited Liability Companies

A. Formation: Limited Liability Company Law §§ 1201, 1203

One or more professionals authorized by law to render the same professional service may form a professional service limited liability company (PLLC) for the purpose of providing the professional service or services as such professionals are authorized to practice (Limited Liability Company Law § 1203 [a]). For this purpose, "professional" includes individuals, professional service corporations, professional limited liability companies, registered limited liability partnerships, and other professional associations (Limited Liability Company Law § 1201 [c]).

The types of professions able to form a PLLC are the same as for a PC and RLLP (*Id.; see* Business Relationships, Professional Service Corporations, III.A.; Business Relationships, Registered Limited Liability Partnerships, IIII.A.) (Limited Liability Company Law §§ 1203 [a], 1204 [a]). For certain professions – including, but not limited to, medicine and dentistry – the PLLC may only provide professional services within the single designated profession and each member of the PLLC must be licensed to provide such services (Limited Liability Company Law §§ 1203 [a]).

Generally, the formation requirements of the Limited Liability Company Law applicable to LLCs are applicable to PLLCs, including the filing of articles of organization with the Secretary of State containing certain detailed information, proper publication of a copy of its articles of organization or a notice containing its substance, and the adoption of an operating agreement. Certificates of authority issued by the licensing authority for the licensed individuals, and for each member, shareholder or partner of a member or manager which is an organization, must accompany the filing of the formation documents (Limited Liability Company Law § 1203 [b]). A PLLC may only render services through licensed individuals in the designated profession or professions, and plans, reports, transcripts, opinions and like documents generated by the company in rendering professional services must bear the signature of the licensed individual in charge of such document (Limited Liability Company Law § 1204). Every PLLC is required to file biennially a statement confirming the address its address for service of process (Limited Liability Company Law § 1213).

B. Name: Limited Liability Company Law § 1212

The name of a PLLC name must end with the words “Professional Limited Liability Company” or “Limited Liability Company” or the abbreviation “P.L.L.C.”, “PLLC”, “L.L.C.” or “LLC” (Limited Liability Company Law § 1212).

C. Professional relationships and liabilities: Limited Liability Company Law § 1205

Each member, manager, employee or agent of a PLLC is personally liable for any negligent or wrongful act or misconduct committed by him or her or any person under his or her direct supervision or control while rendering professional services on behalf of the PLLC, but such members or other persons are not personally liable for the negligence of other members or persons if they did not supervise them or personally participate in the questioned actions with them, nor are they responsible personally for the contractual debts and obligations of the PLLC or any other member (Limited Liability Company Law § 1205 [a]). Each member of a PLLC continues to be governed by the same professional regulatory and licensing scheme applicable to the member prior to formation (*Id.* at [c]).

PARTNERSHIPS

I. General Partnerships

A. Definition: Partnership Law §§ 2, 10

A partnership is an association of two or more persons to carry on as co-owners a business for profit (Partnership Law § 10). For this purpose, “person” includes individuals, partnerships, corporations, limited liability companies, and other associations (Partnership Law § 2).

B. Determining existence: Partnership Law § 11

Section 11 of the Partnership Law sets forth the rules for determining the existence of a partnership. Participation in the profits is prima facie evidence of a partnership. When there is no written partnership agreement between the parties, whether a partnership in fact exists is determined from the conduct, intention, and relationship between the parties. Factors to be considered in determining the existence of a partnership include sharing of profits as well as sharing of losses, ownership of partnership assets, joint management and control, joint liability to creditors, and the intention of the parties (*Brodsky v Stadlen*, 138 AD2d 662 [2d Dept 1988]).

C. Liability of partners: Partnership Law §§ 24, 25, 26

All partners are jointly liable for debts and obligations of the partnership (Partnership Law § 26) and jointly and severally liable for loss or injury to a third person chargeable to the partnership because of a partner’s wrongful act or omission or for a partner’s breach of trust

(Partnership Law §§ 24, 25).

II. Limited Partnerships

A. Formation: Partnership Law (Article 8-A, Revised Limited Partnership Act) § 121-101

A limited partnership is a partnership formed by two or more persons having as members one or more general partners and one or more limited partners (Partnership Law § 121-101 [h]).

Formation of a limited partnership requires the execution by the general partners of a partnership agreement and the filing of a certificate of limited partnership with the Secretary of State containing certain detailed information, including the name, the county in which the partnership office is located, the name and address of each general partner, its duration, designation of the Secretary of State as agent for service of process, and, if desired, designation of a registered agent (*Id.* at 121-201 [a]). A limited partnership must meet substantially the same statutory publishing requirements as an LLC (*Id.* at [c]).

B. Name: Partnership Law §121-102

The name of a limited partnership must contain without abbreviation the words "Limited Partnership" or the abbreviation "L.P" (*Id.* at 121-102 [a] [1]). Other restrictions on words that may be included in the name are substantially the same as for business corporations (*Id.* at [a] [3]), *see* Business Corporations, I.B.).

C. Liability of partners: Partnership Law §121-303

Limited partners are not personally liable for the obligations of the partnership and may not participate in the management of the limited partnership's business without potentially losing their limited liability status with regard to persons who transact business with the limited partnership reasonably believing, based upon the limited partner's conduct, that the limited partner is a general partner (*Id.* at 121-303 [a]). A general partner of a limited partnership has unlimited liability for all debts and obligations of the limited partnership (*Id.* at 121-403 [b]).

III. Registered Limited Liability Partnerships

A. Formation: Partnership Law §121-1500

A general partnership each of whose partners is a professional authorized by law to render the same professional service may form a registered limited liability partnership (RLLP) (Partnership Law § 121-1500 [a] [1]). For this purpose, "professional" includes individuals, professional service corporations, professional limited liability companies, registered limited liability partnerships, and other professional associations (Partnership Law § 2). Each of its partners must be a professional, and at least one of them must be authorized by law to render such professional service within New York (*Id.* § 121-1500 [a] [1]), and for RLLPs formed to provide certain services, including medical services, dental services and veterinary services, each partner must be licensed in New York to provide that service (*Id.* at [q]).

Formation of a RLLP requires the filing of a certificate of registration with the Secretary of State containing detailed information, including the name, the address of its principal office, the profession to be practiced, designation of the Secretary of State as agent for service of process, and, if desired, designation of a registered agent. A RLLP must meet substantially the same statutory publishing requirements as an LLC.

B. Name: Partnership Law §121-1501

The name of a RLLP must contain without abbreviation the words "Registered Limited Liability Partnership" or "Limited Liability Partnership" or the abbreviations "R.L.L.P.", "RLLP", "L.L.P." or "LLP" (Partnership Law § 121-1501).

C. Status statement: Partnership Law §121-1500

A RLLP, unlike a general or limited partnership, must file a status statement with the Department of State every five years to maintain its status as a RLLP, containing among other things, the name of the RLLP, the address of its principal office, the post office address to which the Secretary of State would send a copy of any process against the RLLP served upon him, and a statement that it is eligible to register as a RLLP (Partnership Law § 121-500 [g]). Failure to file the statement may result in the Department of State making a proclamation declaring the registration of the RLLP to be revoked.

D. Liability of partners: Partnership Law § 26

Each partner in a RLLP is personally liable for any negligent or wrongful act or misconduct committed by him or her or any person under his or her direct supervision or control while rendering professional services on behalf of the RLLP, but such partners are not liable for the negligence of other partners or persons if they did not supervise them or personally participate in the questioned actions with them (Partnership Law § 26 [c]). Nor are they responsible personally for the contractual debts and obligations of the RLLP except to the extent at least a majority of the partners have otherwise agreed (*Id.* at [d]). Each partner in an RLLP continues to be governed by the same professional regulatory and licensing scheme applicable to the partner prior to registration (*Id.* at [c]).

CIVIL PRACTICE AND PROCEDURE[2]

I. Personal Jurisdiction

A. Traditional bases for jurisdiction: CPLR 301

1. In general

Jurisdiction over persons, property and status is divided into three categories: in personam, in rem and quasi in rem (CPLR 301). With respect to in personam jurisdiction, New York recognizes five potential bases: presence, consent, domicile, doing business (subject to constitutional limits, *see* Civil Practice and Procedure, I.A.2.) and "long-arm jurisdiction." The first four of these bases fall within CPLR 301. Neither CPLR 302 (regarding long-arm jurisdiction), nor any similar provision that deals with acquisition of jurisdiction in particular situations, supersedes or operates as a limitation upon acquisition of jurisdiction over persons, property or status as previously permitted under common law and judicial decision.

A nondomiciliary who commences an action in New York, even if he or she is not otherwise subject to personal jurisdiction in New York, submits himself or herself to personal jurisdiction in any separate action brought against him or her by any party to the pending action and is deemed to have designated his or her New York attorney as an agent upon whom process may be served in such separate action (CPLR 303). A defendant can use CPLR 303 to acquire jurisdiction over the nondomiciliary plaintiff in a separate action instead of interposing a counterclaim.

2. Constitutional limits

Under New York law, for a plaintiff to demonstrate personal jurisdiction over a defendant, the plaintiff must have either general jurisdiction under CPLR 301 or long-arm jurisdiction under CPLR 302. General jurisdiction permits a court to hear all claims against an entity, whereas specific jurisdiction permits a court to hear only those claims that arise out of the entity's contacts within the state.

Historically under CPLR 301, a foreign corporation was subject to general personal jurisdiction in New York if it was present and doing business in the state, that is, if it was engaged in "continuous, permanent, and substantial activity in New York" (*Landfill Res. Corp. v Alexander & Alexander Servs., Inc.,* 918 F2d 1039, 1043 [2d Cir 1990]).

Pursuant to the landmark decision of *Daimler v Bauman* (571 US 117 [2014]), general personal jurisdiction can no longer be asserted against a foreign corporation based solely on the corporation's continuous and systematic business activity in New York. Due process limits the exercise of general jurisdiction to a state in which the corporation is "at home." If a corporation is not incorporated in New York or maintaining its principal place of business here, New York courts will only exercise general personal jurisdiction in the exceptional case — when the foreign corporation's operations are "so substantial and of such a nature as to render the corporation essentially 'at home'" (*Daimler,* 571 US at 139; *BNSF Ry. Co. v Tyrrell*, 581 US 402*,* 137 SCt 1549 [2017]).

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[2] The Civil Practice Laws and Rules (CPLR) is the primary source for rules of civil procedure in New York. Practitioners are cautioned, however, that there are rules promulgated by the Office of Court Administration and the Chief Administrative Judge, including the Uniform Rules for the Trial Courts (*See* http://ww2.nycourts.gov/rules/trialcourts/index.shtml). In addition, judicial districts, specific courts, individual counties, and individual judges may have their own rules of practice. In order to understand the rules governing a particular matter, it is necessary to consult all of these sources.

B. Long-arm jurisdiction: CPLR 302

Whereas the traditional jurisdictional bases pursuant to CPLR 301 confer "general jurisdiction," state long-arm statutes confer only "specific jurisdiction," meaning that the cause of action must arise out of the defendant's state-connected activity. CPLR 302 contains a list of specific state-connected acts that permit the assertion of in personam jurisdiction as to a cause of action arising from those acts. As to causes of action arising from the enumerated acts, the New York courts may exercise personal jurisdiction over a non-domiciliary who in person or through an agent:

- Transacts any business within New York or contracts to supply goods or services within New York;
- Commits a tortious act within New York, except as to a cause of action for defamation;
- Commits a tortious act outside New York that causes injury within New York (the injured person or damaged property must be located in the state at the time of the injury or damage), except as to a cause of action for defamation, if the defendant (i) regularly does or solicits business, or engages in any other persistent course of conduct in New York, or derives substantial revenue from goods used or consumed or services rendered in New York, or (ii) expects or reasonably should expect the act to have consequences in New York and derives substantial revenue from interstate or international commerce; or
- Owns, uses, or possesses real property within New York.

CPLR 302 (b) also confers personal jurisdiction over a non-resident defendant in a matrimonial action if certain prerequisites are satisfied (*See* Matrimonial and Family Law, II.D.).

Even if a plaintiff's case falls within a particular statutory grant of long-arm jurisdiction, the particular assertion of long-arm jurisdiction must comport with the federal constitutional due process requirements that (1) the defendant must have minimum contacts with New York such that the defendant should reasonably anticipate being sued in New York, and (2) the maintenance of the suit against the defendant in New York must comport with traditional notions of fair play and substantial justice (*Bristol-Meyers Squibb Co. v Super. Ct. of Cal., S.F. Cnty*., 582 US 255, 137 S Ct 1773 [2017]; *Williams v Beemiller, Inc*., 33 NY3d 523 [2019]).

II. Commencement of Action and Service of Process

A. Commencement by filing, including electronic filing: CPLR 304; 22 NYCRR 202.5-b, 202.5-bb

Except in town and village justice courts, actions are commenced by the paper filing or, where authorized or required in some counties and as to certain types of actions, electronic filing of a summons and complaint, or summons with notice, with the clerk of the court in the county where the action is brought.[3] The summons is an initiatory paper that gives a defendant notice of the proceeding and gives the time frame within which the defendant must appear in order to avoid default. The summons must specify the basis of the venue designated by the plaintiff and contain the index number and date of the filing with the clerk of the court (CPLR 305). If a complaint is not served with the summons, the summons must contain a notice stating the nature of the action and the relief sought in the action, and except in medical malpractice actions, the sum of money for which judgment may be taken in the event of a default (*Id).*

A special proceeding (*See* Civil Practice and Procedure, X.A.) is commenced by the paper filing or, where authorized or required, electronic filing of a petition and notice of petition[4] with the clerk of the court in the county where the special proceeding is brought.

For Supreme Court and County Court the "clerk" is the county clerk, not a particular clerk of the court (CPLR 105 [e]).

In town and village justice courts, an action may only be commenced and jurisdiction acquired by service of a summons, and a special proceeding is commenced and jurisdiction acquired by service of either a notice of petition or order to show cause (Uniform Justice Court Act § 400; *see* Civil Practice and Procedure, X.A).

B. Service of process within the state: CPLR 303, 306-b, 308, 310, 311, 311-a, 312-a

Personal service in an action upon a natural person must be made by any non-party at least 18 years of age (CPLR 2103 [a]) pursuant to one of the CPLR 308 subsections: (1) personal delivery, (2) deliver-and-mail service, (3) service upon an agent, (4) affix-and-mail service, or (5) court-ordered service. Each method of personal service requires adherence to the particular provisions of the relevant subsection of CPLR 308. For example, service under CPLR 308 (2) [deliver-and-mail] requires delivery of the process to a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode of the defendant, mailing the process to the defendant at his or her last known residence or actual place of business, and thereafter filing proof of service. Service under CPLR 308 (4) [affix-and-mail] requires affixing the process to the door of the actual place of business, dwelling place or usual place of abode of the defendant, mailing the process to the defendant at his or her last known residence or actual place of business, and thereafter filing proof of service.

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[3] Information about New York State Courts Electronic Filing System ("NYSCEF") can be found on the website of the Unified Court System at https://iapps.courts.state.ny.us/nyscef/HomePage.

[4] Although CPLR 304 does not require the filing of a notice of petition with the petition, one is usually filed, and one must be served on the respondent (CPLR 403 [b]). Also, some other statutes and rules do require filing a notice of petition for commencement of a special proceeding (e.g., Real Prop. Tax Law § 704 [1] [assessment appeals]; Executive Law § 298 [Division of Human Rights]; 22 NYCRR 202.71 [recognition of Tribal Court rulings]; Uniform Dist. Ct. Act § 400; NYC Civ. Ct. Act § 400; Uniform City Ct. Act § 400).

If personal service pursuant to CPLR 308 (1) through (4) is impracticable, a court, upon a plaintiff's ex parte application, has broad discretion to direct the manner by which service is to be made (CPLR 308 [5]; *see Dobkin v. Chapman*, 21 NY2d 490, 498-500 [1968]).

The mailing required by CPLR 308 (2) or (4) must occur within 20 days of the delivery or affixing, and a later mailing will not cure the defect in service (*Estate of Norman Perlman v Kelley*, 175 AD3d 1249 [2d Dept 2019]). When mailing is made to a defendant's actual place of business, it must be by first class mail, the envelope must be labeled "personal and confidential," and it must not indicate that it is from an attorney (CPLR 308 [2], [4]). Service under CPLR 308 (4) is not available unless service under subsections (1) and (2) cannot be made with due diligence.

In matrimonial actions, service must be made under either subdivision (1) or (5) (*See* Matrimonial and Family Law II.E).

Personal service upon a partnership is made pursuant to CPLR 310 by personally serving the process on any one of the partners (CPLR 310 [a]), utilizing any of the methods authorized for service on an individual under CPLR 308 (*Bell v Bell, Kalnick, Klee & Green*, 246 AD2d 442 [1st Dept 1998]; *Foy v 1120 Avenue of the Americas Associates*, 223 AD2d 232 [2d Dept 1996]). A partnership may also be served by serving the managing or general agent of the partnership or the person in charge of the partnership office within the state at such office, mailing the process to the partner intended to be served by first class mail to his or her last known residence or the partnership place of business, and thereafter filing proof of service (CPLR 310 [b]). Where service by any of those methods cannot be made with due diligence, it may be made by affixing a copy of the process to the door of the actual pace of business of the partnership, mailing the process to the partner intended to be served by first class mail to his or her last known residence or the partnership place of business, and thereafter filing proof of service (CPLR 310 [c]). Service may also be made by delivering the process to any properly authorized agent or employee of the partnership, or to any other person designated by the partnership to receive process by a writing filed in the county clerk's office (CPLR 310 [d]).

If a particular method of service on either an individual or a partner requires filing of proof of service, such filing is a prerequisite to the completion of service. The filing must be done within 20 days of the last previous act to effect the service (affixing or mailing), and service is complete 10 days after the filing. The defendant's time to respond does not begin to run until service is complete (CPLR 308 [2], [4], 310 [b], [c]).

Personal service upon a domestic or foreign corporation is made pursuant to CPLR 311 by delivering the process to an officer, director, managing or general agent, or cashier or assistant cashier, or to a registered agent, or (pursuant to BCL 306) to the Secretary of State (*See* Business Relationships, Business Corporations, I.A.).

Personal service upon a domestic or foreign limited liability company (LLC) is made pursuant to CPLR 311-a by delivering the process to (i) any member of the LLC, if the management of the LLC is vested in its members, (ii) any manager of the LLC, if the management of the LLC is vested in one or more managers, or (iii) any other person or agent authorized or designated to receive process, or pursuant to Limited Liability Company Law § 303 by service upon the Secretary of State (*See* Business Relationships, Limited Liability Companies, I.).

CPLR Article 3 contains additional provisions regarding service of process by mail as an alternative method to personal service (CPLR 312-a), and how to effect service upon the state (CPLR 307), governmental subdivisions (CPLR 311), limited partnerships (CPLR 310-a), persons under disabilities (CPLR 309), and courts, boards or commissions (CPLR 312).

C. Service outside New York: CPLR 313

Any person domiciled in the state or subject to personal jurisdiction under the long-arm statute may be served outside the state in the same manner as service is made within the state by any person authorized to make service within New York who is a resident of New York, or by any person authorized to make service by the laws of the jurisdiction in which service is made, or by any duly qualified attorney, solicitor, barrister, or equivalent in such jurisdiction.

D. Time limitations for service of process: CPLR 306

Upon commencement of an action or proceeding by filing, service of process must be made within 120 days of the filing (CPLR 306-b). However, in an action or proceeding in which the statute of limitations is four months or less, for example, a CPLR Article 78 proceeding, service of process is to be made no later than 15 days after the date on which the relevant statute of limitations expires (CPLR 306-b). If the particular method of serving process requires two acts, such as deliver-and-mail service or affix-and-mail service pursuant to CPLR 308 (2) or (4), both acts must be performed within the time period prescribed by CPLR 306-b (*Qing Dong v Chen Mao Kao,* 115 AD3d 839 [2d Dept 2014]). Although filing of proof of service may be necessary for service to be complete and to start running the time for defendant to respond, such filing is considered a ministerial act which need not be completed and is not a requirement for completion of service of process within the CPLR 306-b time period (*See e.g., Rosato v Ricciardi,* 174 AD2d 937 [3d Dept 1991]; *Zhang v Rong*, 2007 NY Slip Op 33684[U] [Sup Ct, NY County 2007]).

If proper service is not timely made on a defendant, the court, upon that defendant's motion, must dismiss the action without prejudice as to that defendant, or upon good cause shown or in the interest of justice, extend the time for service. If the applicable statute of limitations has since expired, the plaintiff must make a motion (or raise the issue in response to a defendant's motion to dismiss) for an extension of time to serve while the action or proceeding is still pending or commencement of a new action will be time-barred (CPLR 306-b; *Sottile v Island Home for Adults*, 278 AD2d 482, 484 [2d Dept 2000]). There are two separate standards by which a court may measure an application for an extension of time to serve. Good cause requires a threshold showing of reasonable diligence in attempting to effect service on the defendant. The interest of justice standard is a broader and more flexible ground for extension. Diligence in effecting service is but one factor the court may consider along with other relevant factors, including the expiration of the statute of limitations, the meritorious nature of the claim, the length of delay and promptness of the request, and prejudice to the defendant (*Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95

[2001]).

E. Service on sabbath or holiday, time computation generally: General Business Law § 13

Service of process on a Sunday, unless expressly authorized by statute, is prohibited and void, whether done in or outside of New York (General Business Law § 13; *Eisenberg v Citation-Langley Corp*., 99 AD2d 700 [1st Dept 1984]). Maliciously serving or procuring service of any process on Saturday upon any person who keeps Saturday as holy time and does not work on that day is a misdemeanor (General Business Law § 13).

When any period of time, computed from a certain day, after which or before which an act is authorized or required to be done, ends on a Saturday, Sunday or a public holiday, such act may be done on the next succeeding business day (General Construction Law § 25-a).

III. Venue and Forum Non Conveniens

A. Proper venue for various types of actions: CPLR 503, 504, 507

The place of trial is the county in which either the plaintiff or defendant resides at the time of commencement of the action, the county in which a substantial part of the events or omission giving rise to the claim occurred, or if neither party resides in the state, any county designated by the plaintiff (CPLR 503 [a]). A corporation or limited liability company is a resident of the county in which its principal office is located (CPLR 503; *Graziuso v 2060 Hylan Blvd. Restaurant Corp.,* 753 NYS2d 103 [2d Dept 2002]). A partnership is deemed a resident of the county in which it has its principal office as well as the county where the partner suing or being sued actually resides (CPLR 503). If a written agreement made before the action is commenced fixes a different place of trial, the agreement will be enforced except in cases where the venue clause is contained in a consumer goods contract or if there is reason to believe that an impartial trial cannot be had in the designated county (CPLR 501, 510 [2], 514).

The place of trial of all actions against municipal defendants is the county in which such municipal defendant is located (CPLR 504 [a], [b]). However, for actions against the city of New York, it is the county within the city in which the cause of action arose, or if it arose outside of the city, in the county of New York (CPLR 504 [c]).

The place of trial of an action to recover student loan debt owed to New York State is the county where the defendant resides if the defendant resides in New York State (CPLR 503 [g]). Similarly, the place of trial of an action arising out of a consumer credit transaction, where the defendant is a purchaser, borrower or debtor, is the county where the defendant resides if the defendant resides in New York State (CPLR 503 [f]). If the defendant in the action related to student debt or a consumer credit transaction does not reside in New York State, then the general venue provisions of CPLR 503 [a] apply (CPLR 503 [f], [g]).

The place of trial of any action in which judgment would affect title to real property is the county where the real property is situated (CPLR 507).

B. Change of venue: CPLR 510, 511

A court upon motion may change venue upon the grounds that venue was improperly placed, an impartial trial cannot be had in the proper county, or if the convenience of material witnesses and the ends of justice will be promoted by the change. In order to move for a change of venue upon the ground that venue was improperly placed, the defendant must first, before or with its answer, serve a written a demand for the change, and if the plaintiff does not agree to the change, make the motion within 15 days of serving the demand. A motion upon any other ground must be made within a reasonable time after commencement of the action.

C. Forum non conveniens: CPLR 327

A court is permitted, even though it has jurisdiction, to decline to entertain the action after examining all the relevant factors of private inconvenience and public interest, including whether the chosen forum is significantly inconvenient for the trial of the action and whether a more appropriate forum is available. Note that, New York, unlike federal courts, does not necessarily require an alternative forum as a precondition to a forum non conveniens dismissal (*See e.g., Islamic Republic of Iran v. Pahlavi,* 62 NY2d 474, 480-81 [1984] (*cf. Piper Aircraft Co. v Reyno,* 454 US 235 [1982]). In New York, the court may stay or dismiss the action, in its entirety or in part, upon any conditions that may be just. Such conditions may include, for example, waiver of defenses such as lack of jurisdiction or statute of limitations. If the alternate venue is another New York court, the court may not transfer the case, unlike federal procedure which permits such a transfer (28 USC § 1404 [a]).

IV. Limitations of Time

A. Statutes of limitations for various types of actions: CPLR 201, 202, 203, 212, 213, 214, 214-a, 215, 217, 217-a; EPTL 5-4.1

An action must be commenced within the limitations period specified in Article 2 unless a different time is prescribed by law or a shorter or longer time is prescribed by written agreement. A court cannot extend the time limited by law for the commencement of an action (CPLR 201).

Under New York's borrowing statute, if a nonresident plaintiff's claim accrued outside of New York, the claim must be timely under both the law of New York and that of the place of accrual. An out-of-state claim that accrues in favor of a New York resident will be governed by the New York statute of limitations regardless of whether the other state's statute of limitations is shorter than that of New York (CPLR 202).

The plaintiff must interpose the claim within the applicable statute of limitations. The time within which an action must be commenced, except as otherwise expressly prescribed, is computed from the time the cause of action accrued to the time the claim is interposed. In all courts except town and village justice courts (*See* Civil Practice and Procedure, II.A.), a claim in an action commenced by filing is deemed interposed when the initiatory papers are filed with the clerk, and a claim in an action commenced by service is deemed interposed when the summons is served upon the defendant or when another statutorily enumerated basis in CPLR 203 [b] is satisfied (CPLR 203 [b], [c]).

If there are several defendants and they are united in interest, commencement as to one will preserve the action as against the others (CPLR 203 [b], [c]). Under the united-in-interest doctrine, the assertion of a claim against an additional defendant after expiration of the statute of limitations will relate back to the commencement date of a timely action against a co-defendant united in interest with the new defendant under the following circumstances:

- The claims against the parties arose out of the same conduct, transaction or occurrence; and
- The new defendant reasonably should have known that the plaintiff made a mistake in failing to timely identify the proper parties; and
- The new defendant and the party originally sued have such a unity of interest that, by reason of their relationship, the new defendant can be charged with such notice of the action that he or she will not be prejudiced in defending the case

(*Buran v Coupal,* 87 NY2d 173 [1995]).

A defense or counterclaim is interposed when a pleading containing it is served, and it is not barred if it was not barred at the time the claims asserted in the complaint were interposed. If the defense or counterclaim arose from transactions or occurrences upon which a claim in the complaint depends, the defense or counterclaim is not barred to the extent of the demand in the complaint, even if time-barred at the time the claims asserted in the complaint were interposed (CPLR 203 [d]).

A claim asserted in an amended pleading is deemed to have been interposed at the time the claims in the original pleading were interposed provided the original pleading gave notice of the transactions or occurrences sought to be proved pursuant to the amended pleading (CPLR 203 [f]).

Except in medical malpractice actions, if a limitations period is measured from discovery of the wrong, the action must be commenced within the later of: (1) the stated limitations period from the wrong itself; or (2) two years from either the discovery of the wrong or, if sooner, when the wrong could with reasonable diligence have been discovered (CPLR 203 [g]).

The precise limitations periods for various types of actions are generally contained in CPLR Article 2. Common limitations periods are set forth here; however, this list is not exhaustive.

CPLR 211 outlines claims that are subject to a 20-year limitation period, including claims to enforce a money judgment.

CPLR 212 outlines claims that are subject to a 10-year limitation period, including adverse possession claims.

CPLR 213 sets forth the types of actions to be commenced within six years, including:

- An action for breach of contract, express or implied, with some stated exceptions, including the four-year statute of limitations for contracts of sale of personal property under the Uniform Commercial Code (UCC § 2-725);
- An action based upon fraud (the greater of six years from the time the fraud was perpetrated or two years from the time the fraud was discovered or could with reasonable diligence have been discovered); and
- An action for which no limitation is specifically prescribed by law.

CPLR 214 delineates the types of actions to be commenced within three years, including:

- An action to recover damages for personal injury (subject to certain statutory exceptions);
- An action to recover damages for injury to property; and
- An action to recover damages for malpractice, other than medical, dental or podiatric malpractice, regardless of whether the underlying theory is based in contract or tort.

CPLR 214-a requires that medical, dental or podiatric malpractice actions be commenced within two years and six months of the alleged act, omission or failure. If there is continuous treatment for the same illness, injury or condition that gave rise to the alleged act or omission, the statute is tolled until the date of the last treatment.

If the action is based upon discovery of a foreign object left in the patient's body (excluding devices placed in the patient for ongoing treatment), the commencement period is tolled until the earlier of one year of (i) the date of discovery or (ii) the date of discovery of facts which would reasonably lead to discovery (CPLR 214-a [a]).

If the action is based upon the failure to diagnose cancer or a malignant tumor, whether by act or omission, the action may be commenced within two years and six months of the later of either (i) when the person knows or reasonably should have known of such alleged negligent act or omission and knows or reasonably should have known that such alleged negligent act or omission has caused injury (but no later than seven years from the act or omission) or (ii) the date of the last treatment where there is continuous treatment (CPLR 214-a [b]).

CPLR 215 sets forth the types of actions to be commenced within one year, including:

- An action to recover damages for intentional torts, such as assault and defamation, except that actions to recover damages for injury arising from domestic violence must be commenced within two years; and
- An action upon an arbitration award.

Unless a shorter time is provided in the law authorizing the proceeding, a special proceeding under Article 78 must be commenced within four months after the determination to be reviewed becomes final and binding or after the respondent's refusal, upon demand, to perform its duty (CPLR 217 [1]).

Most wrongful death actions must be commenced within two years after the decedent's date of death (EPTL 5-4.1; General Municipal Law § 50-i; *see* Torts and Tort Damages, I.H.).

B. Claims against municipalities: General Municipal Law §§ 50-e, 50-i; CPLR 217-a

An action against any political subdivision of the state, any instrumentality or agency of the state or a political subdivision, any public authority, or any public benefit corporation that is entitled to receive a notice of claim as a condition precedent for the commencement of an action to recover damages for personal injury or property damage, other than for wrongful death, must be commenced within one year and 90 days after the cause of action accrues (CPLR 217-1; General Municipal Law § 50-i).

Unless a notice of claim has been served in accordance with General Municipal Law § 50-e, an action may not be maintained against any political subdivision of the state, any instrumentality or agency of the state or a political subdivision, any public authority, or any public benefit corporation that is entitled to receive a notice of claim as a condition precedent for the commencement of an action to recover damages alleged to have been sustained by reason of the negligence or wrongful act of the defendant (General Municipal Law § 50-i; CPLR 217-a). The notice of claim must be served within 90 days after the claim arises or, in the case of wrongful death, 90 days from the appointment of a representative of decedent's estate. The notice of claim must be in writing, sworn to by or on behalf of the claimant, and shall set forth:

- The name and address of the claimant and his or her attorney, if any;
- The nature of the claim;
- The time when, place where and manner in which the claim arose; and
- The items of damage or injuries claimed to have been sustained.

The court, in its discretion, may extend the time to serve a notice of claim, but the extension shall not exceed the statute of limitations for commencing the action against the municipality or other public corporation, i.e., one year and 90 days after the happening of the event or, in the case of wrongful death, within two years of the death of the decedent (General Municipal Law §§ 50-e, 50-i). In determining whether to extend the time to serve a notice of claim, the court must consider whether the municipality or its insurance carrier had actual knowledge of the facts constituting the claim within 90 days of the event, and all other relevant factors, including whether the claimant was an infant or incapacitated, whether the claimant justifiably relied upon settlement representations of a representative of the municipality, and whether the delay in serving the notice of claim substantially prejudiced the municipality in maintaining its defense on the merits (General Municipal Law § 50-e [5]). The statutory factors are a non-exhaustive list of factors the court should weigh (*Williams v Nassau County Med. Ctr.*, 6 NY3d 531 [2006]).

C. Tolling: CPLR 207, 208, 210

When a cause of action accrues against a defendant and the defendant is absent from the state, the limitations period is tolled until the defendant returns. If the defendant leaves the state after a cause of action accrues and remains out of state continuously for four months or more, the period of absence is not part of the limitations period (CPLR 207). However, the absence of the defendant will not suspend the running of the statute of limitations (1) if there is a designated agent that may be served in New York, (2) the defendant is a foreign corporation with an officer or other person in New York on whom service may be made, or (3) jurisdiction over the defendant can be obtained without personal delivery of the summons to the defendant within New York (CPLR 207 [1] – [3]). For example, absence from the state will not toll the statute of limitations for an action against a nonresident subject to long-arm jurisdiction (*See* Civil Practice and Procedure, II.B.) who may be served without the state (*See* Civil Practice and Procedure, III.C.)(*e.g.,Salamon v Friedman*, 11 AD3d 700 [2d Dept 2004]).

Infancy and insanity are disabilities which may toll the applicable statute of limitations. Under CPLR 208 (a), if the applicable statute of limitations is less than three years, the statute of limitations does not run during the entire period of disability. If the applicable period is three years or longer, a plaintiff will have at least three years to sue from the time the disability ceases. CPLR 208 applies only when the plaintiff is under such disability at the time the cause of action accrues. The maximum toll permitted in the case of insanity is ten years, as it is for an infant's cause of action for medical, dental or podiatric malpractice. In other cases involving an infant, there is no ten-year maximum limit.

Under New York's Child Victims Act, the statute of limitations and any notice of claim requirements for civil actions related to a sexual offense (as defined in the Penal Law) committed against a child were lifted until August 13, 2021 and such actions granted trial preference. For a civil action whose statute of limitations has not expired, the action may be commenced against any party whose intentional or negligent acts or omissions are alleged to have resulted in the commission of said conduct on or before the plaintiff reaches the age of 55 years (CPLR 208 [b]).

If a plaintiff dies before the expiration of the limitations period, his or her executor or administrator has the greater of that limitation period or one year from the death in which to sue (CPLR 210 [a]; *Ruping v Great Atl. & Pac. Tea Co.*, 279 App Div 322 [3d Dept 1952]). If a potential defendant dies before an action is commenced against the defendant, 18 months are added to the limitations period, thereby extending the time during which the action may be commenced against the defendant's estate (CPLR 201 [b]).

D. New action following termination: CPLR 205 (a)

If an action is timely commenced and terminated in any other manner than by a final judgment on the merits, a voluntary discontinuance, neglect to prosecute, or a failure to obtain personal jurisdiction over the defendant, and the statute of limitations has or is about to expire, the plaintiff may nonetheless commence a new action upon the same transaction or occurrence within six months after the termination of the prior action, provided service upon the defendant is effected within such six-month period (CPLR 205 [a]). Application of such six-month period is not needed if the statute of limitations has not run when the new action is commenced. Special rules and exceptions apply to the termination and commencement of foreclosure proceedings (CPLR 205-a).

V. Appearances and Pleadings

A. Defendant's appearance: CPLR 320, 321 (a), 3012 (b)

A defendant appears in an action by serving an answer, making a motion which has the effect of extending the time to answer (*See* Civil Practice and Procedure, VIII.D.), or serving a notice of appearance. If the defendant was served by personal delivery within the state of New York, the time to appear is no later than 20 days from the delivery. In most other cases, including service outside the state and service under CPLR 308 (2) through (5), the time to appear is not later than 30 days after service is complete (CPLR 320 [a]; *see* Civil Practice and Procedure, III.B.).

If the complaint is not served with the summons (that is, when the action was commenced by the filing of a summons with notice), defendant may, within the time the defendant would otherwise be required to appear, serve a written demand for the complaint. The plaintiff must then serve the complaint within 20 days after service of the demand. Service of the demand extends defendant's time to appear until 20 days after service of the complaint (CPLR 3012 [b]).

An appearance by the defendant confers jurisdiction over the defendant's person unless an objection to jurisdiction is raised in a motion or answer in accordance with CPLR 3211 (a) (8) (*See* Civil Practice and Procedure, IX.D.) or the defendant makes a limited appearance in an action based on quasi-in rem or in rem jurisdiction (CPLR 320 [b], [c] [1]-[2]).

Any party may appear in an action pro se or through an attorney, except that a corporation or limited liability company generally must appear through an attorney unless defending a claim in a small claims part (CPLR 321 [a]; *Michael Reilly Design, Inc. v Houraney*, 40 AD3d 592 [2d Dept 2007]; *see* The New York Court System, III.). An attorney appearing on behalf of a party for limited purposes must file a notice of limited scope appearance, defining the purposes for which the attorney is appearing (CPLR 321 [d]). After completing those purposes, the attorney must file a notice of completion of limited scope appearance, which constitutes the attorney's withdrawal from the action (*Id.*).

B. Change or withdrawal of attorney: CPLR 321

Once a party appears in an action through an attorney, the attorney of record may be changed with the client's consent by filing a consent to change attorneys signed by the retiring attorney and signed and acknowledged (*See* Appendix C) by the party. Notice of the change of attorney must be given to the attorneys for all parties (CPLR 321 [b] [1]). An attorney of record may also withdraw from representation or be changed without the client's consent by court order upon motion on notice to the client, to the attorneys of record for all other parties to the action, and to any unrepresented parties (CPLR 321 [b] [2]).

C. Types of pleadings: CPLR 3011

The basic pleadings in an action are a complaint and an answer, which may include a counterclaim against a plaintiff and a cross-claim against a defendant. A defendant's pleading against any other person not already a party is a third-party complaint. Other pleadings are a reply to a counterclaim labeled as such, an answer to any third-party complaint, and an answer to a cross-claim that contains a demand for an answer. If no answer is demanded, the cross-claim is deemed denied. No other pleadings are permitted without court order.

D. Responsive pleadings: CPLR 3018, 3012

A party in responding to a claim either by an answer or a reply to a counterclaim must either deny allegations known or believed to be untrue and/or specify allegations of which a party lacks knowledge or information sufficient to form a belief. Any allegation not so addressed is deemed admitted, unless it is contained in a pleading for which no responsive pleading is required, e.g., a cross-claim that does not demand an answer. In a responsive pleading a party must plead any matter which, if not pleaded, would be likely to take the adverse party by surprise or would raise facts or issues not appearing on the face of a prior pleading.

The statute (CPLR 3018 [b]) contains a list of affirmative defenses which must be so pleaded, including collateral estoppel, release, res judicata, statute of frauds, and statute of limitations. These affirmative defenses, along with some of the others listed, are also included in the list of defenses set forth in CPLR 3211 (e) that are waived if not raised in the answer or a pre-answer motion to dismiss (*See* Civil Practice and Procedure, VIII.D.). This list is not all-inclusive and there are other affirmative defenses which, if likely to take the plaintiff by surprise or raise facts or issues not appearing on the face of a prior pleading, must be pleaded, including culpable conduct claimed in diminution of damages (CPLR 1412).

Service of an answer or reply must be made within 20 days after service of the pleading to which it responds (CPLR 3012 [a]), except that the time to answer a complaint is 30 days after service is complete when the summons and complaint were served by a means other than personal delivery within the state (CPLR 3012 [c]).

E. Counterclaims and cross-claims: CPLR 3019

A counterclaim is a cause of action asserted by a defendant against a plaintiff. It need not arise out of the transaction or occurrence out of which the plaintiff's claim arises, nor otherwise be related to the plaintiff's claim. It can be any cause of action the defendant has against the plaintiff, legal or equitable. In contrast to federal practice, every counterclaim in New York is permissive, even if its subject matter relates to plaintiff's claim (*Urbanski v Urbanski*, 107 Misc 2d 215 [Sup Ct. Orange Co. 1980]). However, defendants who wait to assert a related claim in a separate action should be cautioned that facts found in the first action could result in a successful res judicata defense against their claim in the second action (*Chisholm-Ryder Co. v Sommer & Sommer*, 78 AD2d 143 [4th Dept 1980]).

A cross-claim is a cause of action by one defendant against another. In contrast with federal practice, a cross-claim may be asserted for any cause of action at all, whether or not related to the plaintiff's claim.

F. Joinder of claims, consolidation: CPLR 601, 602

The plaintiff in a complaint or the defendant in an answer setting forth a counterclaim or cross-claim may join as many claims as the plaintiff or the defendant may have against an adverse party (CPLR 601[a]). In considering whether to join claims, counsel should be aware that joinder of a claim for legal relief with a transactionally related claim for equitable relief automatically waives the right to jury trial with respect to the legal claim (CPLR 4102 (c); *Zimmer-Masiello, Inc. v Zimmer, Inc.,* 164 AD 845 [1st Dept 1990]). On the other hand, failure to join two such transactionally related claims could result in the second claim being barred by res judicata (claim preclusion) (*O'Brien v City of Syracuse*, 54 NY2d 353, 357 [1981]).

When actions involving a common question of law or fact are pending before a court, the court, upon motion, may order a joint trial or consolidation of the actions and may make such other orders as may tend to avoid unnecessary costs or delay (CPLR 602 [a]).

Where an action is pending in the Supreme Court, the Supreme Court may, upon motion, remove to itself an action pending in another court and consolidate the actions or try them together. Where an action is pending in the County Court, the County Court may, upon motion, remove to itself an action pending in a city, municipal, district or justice court in the county and consolidate the actions or try them together (CPLR 602 [b]).

G. Verification of pleadings: CPLR 3020, 3021; Appendix C

A verification is a statement by a party under oath that a pleading is true to the knowledge or belief of the person making the statement, who, if the party is an individual, is the individual, or if the party is a corporate or governmental entity, is an appropriate representative of the party. Under certain circumstances, including when the party is a foreign corporation or when the party is not in the county where the attorney has his or her office, the verification may be made by the attorney (CPLR 3020 [d]).

With some exceptions, pleadings need not be verified, but if a pleading is verified, each subsequent pleading must be verified, unless the matter to be verified is privileged. If a counterclaim or cross-claim in an answer is separately verified, it is given the same effect as if it were a separate pleading, so that any pleading responding to it must be verified.

Initial pleadings which require verification include a complaint in a matrimonial action (*See* Matrimonial and Family Law, II.E.), a petition in an Article 78 proceeding (*See* Civil Practice and Procedure, X.B.), and a petition in a summary proceeding to recover possession of real property (*See* Real Property, I.H.).

H. Amended and supplemental pleadings: CPLR 3025

Amendments to a pleading may be made once without leave of court within 20 days after its service or any time before the time to respond expires or within 20 days after service of a pleading responding to it. Thereafter, a party may amend a pleading or may supplement it by setting forth additional or subsequent transactions or occurrences only by leave of court or stipulation of the parties. If an answer or reply is required to the pleading being amended or supplemented, that answer or reply must be served within 20 days after service of the pleading to which it responds.

I. Bill of particulars: CPLR 3041, 3042, 3043, 3044

The purpose of a bill of particulars is to amplify the pleadings (not to obtain evidence, *e.g., Arroyo v. Fourteen Estusia Corp.*, 194 AD2d 309 [1st Dept 1993]) and is available between parties in an action (CPLR 3041).

The procedure to secure a bill of particulars is to serve a written demand on the party from whom the particulars are sought. Within 30 days of service of the demand, the party on whom the demand is made must serve a bill of particulars responding to each item of the demand, either by complying with the demand or by objecting to it with a statement specifying the objection "with reasonable particularity" (CPLR 3042 [a]). The assertion of an objection to one or more of the items will not relieve a party from the obligation to respond in full to the items of the demand to which no objection is made (*Id.*).

A party may amend a bill of particulars once without leave of court before a note of issue is filed (CPLR 3042 [b]). If a party fails to timely respond or fails to comply fully with a demand, the party seeking the bill of particulars may move to compel compliance, or if the failure is willful, seek appropriate relief, including an order that the issues to which the information is relevant shall be deemed resolved, or an order prohibiting the disobedient party from supporting or opposing designated claims or defenses or from producing in evidence designated things or items of testimony, or an order striking out a pleading or parts of a pleading. (CPLR 3042 [c], [d], 3126). If a court determines that a demand for particulars, or any part thereof, is improper or unduly burdensome, it may vacate or modify the demand, or make such order as is just (CPLR 3042 [e]).

In a personal injury action, the items that may be demanded have been codified (CPLR 3043 [a] [1] - [a] [9]) and include: the date, time, and location of the occurrence; a statement of the acts or omissions constituting the claimed negligence; a statement of the injuries sustained; and the amounts claimed as special damages for medical expenses and lost wages. In a personal injury action, a party may serve a supplemental bill of particulars with respect to claims of continuing special damages and disabilities without leave of court at any time up to 30 days prior to trial (CPLR 3043 [b]). No new cause of action may be alleged or new injury claimed, and the other party may seek discovery regarding the supplemental information (*Id.*).

If a pleading is verified, any bill of particulars in respect to it must also be verified. In a negligence case, the bill of particulars must be verified whether or not the pleading is verified (CPLR 3044).

VI. Affirmation in Lieu of Affidavit: CPLR 2106

In an action in New York, any person may submit an unnotarized affirmation in lieu of a notarized affidavit, and the affirmation will have the same force and effect as an affidavit (CPLR

2106). The person making the affirmation must affirm it to be true under penalty of perjury (*Id.*).

VII. Parties

A. Necessary and proper parties: CPLR 1001, 1002, 1003

A necessary party is a person who ought to be a party if complete relief is to be accorded between persons who are parties to the action or who might be inequitably affected by a judgment in the action (CPLR 1001). When a person who should join as a plaintiff refuses to do so, that person may be made a defendant. Necessary parties must be joined in the action if they are subject to the jurisdiction of the court. If they are not subject to and do not consent to the jurisdiction of the court, the court, when justice requires, may allow the action to proceed without them.

The permissive joinder of claims by multiple plaintiffs as well as the joinder of multiple defendants by a plaintiff is permitted if the claims:

- Arise out of the same transaction, occurrence, or series of transactions or occurrences; and
- Have in common any question of law or fact

(CPLR 1002 [a], [b]).

Nonjoinder of a necessary party may be a ground for dismissal (CPLR 3211 (a) (10) (*See* Civil Practice and Procedure, VIII.D.), but misjoinder of a party (the inclusion of a person who is neither a necessary nor permitted party) is not. A court may either drop a misjoined party from the action or sever the claims so that a separate action may proceed against the misjoined party (CPLR 1003).

Parties may be added at any stage in the action by leave of court or stipulation of all parties who have appeared, or one time without leave of court within 20 days after service of the summons or within the time period for responding to the summons, or within 20 days after service of a pleading responding to it (*Id.*).

B. Third-party practice: CPLR 1007, 1008, 1009

"Impleader" or third-party practice is a procedure whereby a defendant is permitted to proceed against a person not a party, who is or may be liable to the defendant for all or part of the plaintiff's claim against the defendant, by bringing that person into the lawsuit so that the original claim and the related claim against the added person may be decided in a single suit. The original party defendant is called the third-party plaintiff, and the impleaded party is called the third-party defendant. A party may commence a third-party action after service of his or her answer.

The third-party summons and complaint must be filed with the clerk of the court and served, together with all prior pleadings, on the third-party defendant within 120 days of such filing (CPLR 1007). A copy of the third-party complaint must also be served on the original plaintiff's attorney (*Id.*) and on any other party who has appeared in the action (CPLR 2103 [e]).

Thereafter, the third-party defendant must serve an answer on the third-party plaintiff and on any other party who has appeared in the action (CPLR 2103 [e]). The answer may contain any defenses the third-party defendant has against the original plaintiff's claims or the third-party plaintiff's claims. The third-party defendant's answer may also assert any counterclaims or cross-claims the third-party defendant has against any other party to the action (CPLR 1008).

Within 20 days after service of the answer to the third-party complaint on the plaintiff's attorney, the plaintiff may amend his or her complaint without leave of court to assert against the third-party defendant any claim plaintiff has against such party (CPLR 1009).

C. Partnerships and unincorporated associations (CPLR 1025)

Two are more persons conducting business as a partnership may sue or be sued in the partnership name. Actions may be brought by or against the president or treasurer of an unincorporated association on behalf of the association.

VIII. Provisional Remedies

A. Attachment: CPLR art 62

Attachment is a form of seizure of a defendant's property by the sheriff, who holds the property for potential satisfaction of a judgment in plaintiff's favor, helping secure the enforcement of a money judgment. Attachment is available only in an action, in whole or in part, for a money judgment and only upon motion demonstrating one of the grounds in CPLR 6201. The most common grounds are:

- The defendant is a nondomiciliary residing without the state, or is a foreign corporation not qualified to do business in the state;
- The defendant resides or is domiciled in the state and cannot be personally served despite diligent efforts to do so; or
- The defendant, with intent to defraud his or her creditors or frustrate the enforcement of a judgment that might be rendered in plaintiff's favor, has assigned, disposed of, encumbered or secreted property, or removed it from the state or is about to do any of these acts

(CPLR 6201 [1] – [3]).

Any debt or property against which a money judgment may be enforced (CPLR 5201) is subject to attachment (CPLR 6202).

A motion for an order of attachment may be made with or without notice, before or after service of a summons and at any time prior to judgment. If an order of attachment is granted without notice, the plaintiff must move on notice to the defendant for an order confirming the order of attachment. The motion must be made within ten days after levy by the sheriff if the ground for attachment is that defendant is a nondomiciliary residing without the state or is a foreign corporation not qualified to do business in the state, and within five days if any other ground applies.

The plaintiff making a motion for an order of attachment, or for an order confirming an order of attachment granted without notice, must show through affidavits and other evidence the existence of a cause of action, a probability of success on the merits, the existence of one or more grounds for attachment and that the amount demanded from the defendant exceeds all counterclaims known to the plaintiff. The plaintiff must also provide an undertaking in an amount set by the court. The plaintiff must file the order of attachment and the papers upon which it was based, including the summons and complaint, within ten days of the granting of the order (CPLR 6212).

In the event the order of attachment is granted before a summons is served on the defendant, the summons must be served within 60 days after the order is granted, subject to an extension upon application to the court upon good cause shown (CPLR 6213).

B. Preliminary Injunction, temporary restraining order: CPLR art 63; 22 NYCRR 202.8-e

A preliminary injunction is a court order that seeks to safeguard rights asserted by the plaintiff in a pending action or special proceeding to preserve the status quo until the case can be fully adjudicated on the merits. Preliminary injunctive relief may be granted upon two grounds:

- The defendant threatens to harm plaintiff's rights in the subject of the action and such harm could render the judgment ineffectual;
- The plaintiff seeks a judgment restraining the defendant from injurious conduct that would also injure the plaintiff if committed during the course of the action

(CPLR 6301).

A preliminary injunction is not available in an action seeking solely money damages (*Credit Agricole Indosuez v Rossiyskiy Kredit Bank,* 94 NY2d 541 [2000]).

The procedure for getting a preliminary injunction is a motion in a pending action, which must be made on notice to the defendant. The notice of motion may be served with the summons or at any time thereafter before a final judgment (CPLR 6311 [1]).

Supporting affidavits and other evidence must show that the underlying action falls within one of the grounds for a preliminary injunction specified in CPLR 6301 (CPLR 6312 [a]). In addition to the foregoing specified statutory requirements, courts also require a showing of:

- The likelihood of success on the merits of the action,
- The threat of irreparable injury, and
- A balance of equities in plaintiff's favor

(*Doe v Axelrod,* 73 NY2d 748, 750 [1988]).

Before getting a preliminary injunction, the plaintiff must submit an undertaking in an amount set by the court so that if it is finally determined that the plaintiff was not entitled to such relief, the plaintiff will pay the defendant all damages and costs which were sustained by reason of the injunction (CPLR 6312 [b]).

A temporary restraining order (TRO) provides immediate injunctive relief while the court determines a motion for a preliminary injunction (CPLR 6301). In most actions and proceedings, the plaintiff must give the opposing party notice of the application for a TRO with a copy of any supporting papers sufficiently in advance to permit the opposing party to contest the application, unless the court excuses notice based upon the plaintiff showing significant prejudice if notice is given or a good faith effort to provide notice (22 NYCRR 202.8-e). To obtain a temporary restraining order, a plaintiff must demonstrate that immediate and irreparable injury, loss or damages will result unless the defendant is restrained before a hearing on the motion for a preliminary injunction can be held (CPLR 6313 [a]). An undertaking is discretionary with the court (CPLR 6313 [c]).

C. Notice of pendency: CPLR art 65

A notice of pendency may be filed in an action in which the judgment demanded would affect the title to, or the possession, use or enjoyment of, real property, except a summary proceeding brought to recover the possession of real property (CPLR 6501 [a]). It prevents a potential transferee or mortgagee of the property from acquiring the status of innocent purchaser for value while the action is pending by placing a cloud on the marketability of the defendant's title for the duration of a lawsuit.

On or after commencement of an action, the notice of pendency is filed in the office of the clerk of the county where the property is located, without notice to the defendant or leave of court, without an undertaking, and before or after service of process (CPLR 6511); however, once filed, the summons, if not already served, must be served on the defendant within 30 days (CPLR 6512).

A notice of pendency filed pursuant to CPLR 6501 [a] is effective for three years from the date of filing and may be extended by court order for good cause shown (CPLR 6513).

IX. Motions

A. Motion practice: CPLR 2214 (motion papers); 22 NYCRR 202. 8-d (orders to show cause), 22 NYCRR 202.6 (request for judicial intervention); 22 NYCRR 202.7 (affirmation of good faith)

A motion requires a notice of motion specifying the time and place of the motion, the papers on which it is based, the relief sought, and the ground upon which the movant believes itself entitled to the relief (CPLR 2214 [a]). The court may grant an order to show cause, to be served in lieu of a notice of motion, when there is a genuine urgency (e.g., an application for provisional relief), if a stay is required, or when a statute mandates use of an order to show cause (22 NYCRR 202.8-d). An order to show cause is a judicial order, obtained ex parte, that specifies the date and place of the hearing and the manner of its service. An order to show cause against a state body or officers must be served not only upon the defendant or respondent state body or officers but also upon the attorney general (CPLR 2214 [d]).

The time and place of the hearing of the motion can be set only after the movant has filed a Request for Judicial Intervention ("RJI") and a judge has been assigned to the action (*See* 22 NYCRR 202.6; Civil Practice and Procedure, XII.A.). When preparing a notice of motion, it is important to check the rules of the individual court and judge regarding the times and places for hearing motions.

If a motion pertains to disclosure or a bill of particulars, it must contain an affirmation that, prior to making the motion, counsel has conferred with opposing party's counsel in a good faith effort to resolve the issues raised by the motion (22 NYCRR 202.7).

B. Service of papers on attorneys: CPLR 2103

If a party has an attorney, all papers including motion papers and pleadings other than the summons and complaint shall be served (by a person who is not a party and is at least 18 years of age [*see* CPLR 2103 (a)] on the party's attorney. And if a defendant is known to have an attorney, the defendant may authorize service of the summons and complaint on the defendant's attorney.

Papers may be served on an attorney by:

- Personal delivery;

- Mail, in which case service is complete upon mailing and five days is added to any period of time measured from service of the paper so served if the mailing is done in New York, and six days is added if done outside the state;

- Delivery of the paper to the attorney's office;

- Transmitting the paper by facsimile transmission, provided that a telephone number is provided by the attorney for that purpose, in which case service is complete upon the sender receiving a signal that the transmission was received and mailing a copy of the paper to the attorney;

- Dispatching the paper by overnight delivery service, in which case service is complete upon dispatch and one business day is added to any period of time measured from service of the paper so served; or

- Electronic means to the extent permitted or required by court rule (22 NYCRR 202.5-bb).

C. Times for service of motion papers: CPLR 2214, 2103

A notice of motion must be served at least 8 days before the date when the motion is to be heard. Answering affidavits must then be served at least 2 days before the date when the motion is to be heard.[5] But answering affidavits and any notice of cross-motion with supporting papers, if any, must be served at least 7 days before the date when the motion is to be heard if the notice of motion is served at least 16 days before the date when the motion is to be heard and so demands, in which case any reply or responding affidavits must be served at least 1 day before the date when the motion is to be heard.

As noted above, if service is made by mail, 5 days are added to the prescribed time periods if the mailing is done in New York, and 6 days is added if done outside the state. For example, service of a notice of motion by mail must be mailed in New York at least 13 days (8 + 5) before the date when the motion is to be heard, or at least 21 days (16 + 5) before the date when the motion is to be heard if the moving party wants to demand service of answering affidavits and any notice of cross-motion at least 7 days before the date when the motion is to be heard. And if those answering affidavits are served by mail, they must be mailed at least 12 days (7 + 5) before the date the motion is to be heard.

These additional times apply to all papers served in an action or proceeding (not just motion papers) and are intended to give the party responding to service by mail the full amount of the time provided for the response but not to extend a time period applied to the party serving by mail. For example, a defendant who serves by mail an answer raising a defense of improper service does not receive an extension of the 60-day period within which the defendant must move to dismiss based on that defense (*See* Civil Practice and Procedure, VIII.D.; *HSBC Bank USA, N.A. v Maniatopoulos*, 175 AD3d 575 [2d Dept 2019]).

D. Motion to dismiss: CPLR 3211

A party may move for a judgment dismissing one or more causes of action asserted against the party. There are 11 grounds listed in CPLR 3211 (a) on which a party may move to dismiss a complaint or cause of action. A party may also move for a judgment dismissing a defense on the ground that the defense is not stated or has no merit (CPLR 3211 [b]). Upon the hearing of the motion, either party may submit supporting affidavits and other evidence, or the court may, when appropriate for the expeditious disposition of the controversy, order immediate trial of the issues raised.

CPLR 3211 (e) permits a motion to dismiss a cause of action under CPLR 3211 (a) to be made before service of the responsive pleading is required. Thus, if the defendant has 20 days to answer the complaint and wishes to make a pre-answer motion to dismiss the complaint under CPLR 3211 (a), the defendant must make the motion within that time. Only one pre-answer motion to dismiss may be made.

Service of a notice of motion to dismiss a cause of action before a responsive pleading is due extends the time to serve a responsive pleading until ten days after service of notice of entry of the order determining such motion (CPLR 3211 [f]).

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[5] In any computation of a period of two days, Saturday, Sunday or a public holiday must be excluded if it is an intervening day (General Construction Law § 20). For example, if the return date for a motion is a Monday, the answering papers must be served the previous Thursday.

If the defendant makes a pre-answer motion to dismiss, the defendant may raise any of the 3211 (a) grounds to dismiss available to the defendant. However, if the defendant makes a pre-answer motion and fails to include a defense based upon lack of personal jurisdiction (CPLR 3211 [a] [8]), or lack of jurisdiction where service was made under CPLR 314 (service outside of New York in certain in rem actions such as matrimonial actions) or 315 (service by publication in such in rem actions) (CPLR 3211 [a] [9]), those defenses are waived.

A defense based upon one of several enumerated grounds in CPLR 3211 (e) is waived if not raised by a pre-answer motion or as a defense in the answer. These grounds include: documentary evidence (paragraph [a] [1]), lack of legal capacity to sue (paragraph [a] [3]), another action pending (paragraph [a] [4]), or defenses such as collateral estoppel, discharge in bankruptcy, infancy or other disability of the moving party, release, res judicata, statute of limitations or statute of frauds (paragraph [a] [5]).

An objection based upon lack of subject matter jurisdiction (paragraph [a] [2]), failure to state a cause of action (paragraph [a] [7]), or failure to join a necessary party (paragraph [a] [10]) may be raised at any time by motion or in a subsequent pleading. These objections may be raised even if a pre-answer motion was served and the defense was not included and even if an answer was served without raising the defense.

An objection that the initial pleading was not properly served is waived if, having raised such an objection in the responsive pleading, the objecting party does not move for judgment on such ground within 60 days after serving the pleading, unless the court extends the time upon the ground of undue hardship (CPLR 3211 [e]). Exceptions to this rule apply to certain proceedings involving consumer debt collection and tenant evictions (*Id.*).

Upon the hearing of the motion, either party may submit affidavits and other documentary evidence, and the court may, when appropriate for the expeditious disposition of the controversy, order immediate trial of the issues raised on the motion. Also, a motion to dismiss may be treated by the court, after adequate notice to the parties, as one for summary judgment, even if it is a pre-answer motion (CPLR 3211 [c]; *see* Civil Practice and Procedure, IX.E.).

On a motion to dismiss pursuant to CPLR 3211, the court affords the pleading a liberal construction, accepts all facts as alleged in the pleading to be true, accords the plaintiff the benefit of every possible favorable inference, and determines only whether the facts as alleged fit within any cognizable legal theory (*See Leon v Martinez,* 84 NY2d 83, 87-88 [1994]). The foregoing standards are especially relevant to a motion based on documentary evidence (paragraph [a] [1]), a listed defense (paragraph [a] [5]), or failure to state a cause of action (paragraph [a] [7]) but are also relevant to a motion based on any of the other grounds to the extent applicable.

E. Motion for summary judgment: CPLR 3212; 22 NCYRR 202.8-g

A party may move for summary judgment in any action. The earliest time for the making of a motion for summary judgment is the joinder of issue (service of defendant's answer) and the latest time is 120 days following the filing of the note of issue (*See* Civil Practice and Procedure, XIII.B.). A court may, in a particular action or by a general rule, set an earlier date but not earlier than 30 days after the filing of a note of issue. A court can set aside the time restriction and allow a late summary judgment motion if good cause is shown (CPLR 3212 [a]). "Good cause" requires a showing of good cause for the delay in making the motion. That the delay is nonprejudicial and the motion is meritorious is not good cause that will permit a late filed motion to be heard (*Brill v City of New York*, 2 NY3d 648 [2004]).

The party seeking summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. CPLR 3212 (b) requires that the moving party attach a complete set of the pleadings and submit affidavits made by one with knowledge of the facts, and all other available evidentiary proof in admissible form, showing that there is no defense to the cause of action or that the cause of action or defense has no merit. The movant must also attach to the notice of motion a short and concise statement, formatted in numbered paragraphs stating separately which material facts are not in genuine issue (22 NYCRR 202.8-g [a]). The party opposing summary judgment must include a response to each statement of the moving party with correspondingly numbered paragraphs, and if necessary, additional numbered paragraphs, separately and concisely stating material facts for which there is a genuine issue to be tried (22 NYCRR 202.8-g [b]). Conclusory assertions or assertions and allegations made by any party based solely upon information and belief are insufficient to obtain summary judgment. An attorney's affidavit as to the facts is insufficient if not based on personal knowledge (*Zuckerman v City of New York,* 49 NY2d 557, 562 [1980).

Summary judgment will be granted if upon all the papers and proof submitted judgment is warranted for one side or the other as a matter of law. Summary judgment will be denied if any party shows facts sufficient to require a trial of any issue of fact. If it appears that the only triable issues of fact relate to the amount or extent of damages, or if the motion is based on any of the grounds permitted for a motion to dismiss, the court may, when appropriate for the expeditious disposition of the controversy, order an immediate trial of such issues of fact (CPLR 3212 [c]).

The court may search the record and, if it appears that any party other than the moving party is entitled to summary judgment on an issue raised in the moving party's motion, the court may grant such judgment without the necessity of a cross-motion or notice to the parties (CPLR 3212 [b]; *Kenneth Fine Repairs, LLC v. State*, 133 AD3d 1181, 1182 [2015]).

F. Motion for relief from judgment or order: CPLR 5015

Any party may move to vacate a judgment or order upon the grounds set forth in CPLR 5015, which are excusable default, newly-discovered evidence, fraud, misrepresentation or other misconduct of an adverse party, lack of jurisdiction to render the judgment or order, and reversal, modification or vacatur of a prior judgment or order upon which the current judgment or order is based. An application to vacate a default judgment on the ground of excusable default requires an excuse for the default and an affidavit of merits demonstrating a meritorious defense (*e.g., Gray v. B. R. Trucking Co*., 59 NY2d 649 [1983]), and there is a one-year time limitation for the making of the motion, running from the time of service of a copy of the judgment or order with written notice of entry, or, if the moving party entered the judgment or order, from the date of entry (CPLR

5015 [a] [1]). Motions to vacate on the other grounds must be made within a "reasonable time" (*Nash v Port Auth. of N.Y. & New Jersey*, 22 NY3d 220, 225 [2013]). A court may vacate a judgment or order upon such terms as may be just, empowering the court to direct restitution or impose conditions when it vacates a judgment or order (CPLR 5015 [d]).

G. Motion for summary judgment in lieu of complaint: CPLR 3213

If an action is based upon an instrument for the payment of money only or upon any judgment, the plaintiff may serve with the summons, in lieu of a complaint, a notice of motion for summary judgment with appropriate supporting papers. Additional notice requirements apply to debt collection cases arising out of consumer credit transactions. The summons shall require the defendant to submit answering papers on the motion within the time provided in the notice of motion. The minimum time such motion shall be noticed to be heard shall be as provided by CPLR 320 (a) for making an appearance in an action, depending upon the method of service (*See* Civil Practice and Procedure, V.A.). If the plaintiff sets the hearing date of the motion later than that minimum time, the plaintiff may require the defendant to serve a copy of his answering papers upon him within such extended period of time, not exceeding ten days prior to such hearing date. If the motion is denied, the moving and answering papers will be deemed a complaint and answer, respectively, unless the court orders otherwise.

H. Default judgment: CPLR 3215

When a defendant fails to appear, plead or proceed to trial of an action reached and called for trial, or when the court orders a dismissal for any other neglect to proceed, the plaintiff may seek a default judgment (CPLR 3215 [a]). If the plaintiff fails to take proceedings to obtain a default judgment within one year after the default, the court shall dismiss the complaint as abandoned, upon its own initiative or on motion by the defendant, unless sufficient cause is shown why the complaint should not be dismissed. Such a motion by the defendant does not constitute an appearance in the action (CPLR 3215 [c]).

The court, on motion, may extend the time to appear or plead, or compel the acceptance of a pleading untimely served, upon a showing of reasonable excuse for delay or default (CPLR 3012 [d]).

A defendant may be relieved from a default judgment upon such terms as may be just, upon the ground of excusable default, if such motion is made within one year after service of a copy of the judgment or order with written notice of its entry upon defendant, or, if the defendant has entered the judgment, within one year after such entry (CPLR 5015 [a] [1]).

Reasonable excuse for delay or default for either a motion to extend the time to appear or plead or a motion to be relieved from a default judgment may be based on a delay or default resulting from law office failure (CPLR 2005).

I. Want of prosecution: CPLR 3216

If a party unreasonably neglects to proceed generally in an action or otherwise delays in the prosecution thereof, or unreasonably fails to serve and file a note of issue, the court, on its own initiative or upon motion, with notice to the parties, may dismiss the party's pleading, provided:

- Issue has been joined in the action;
- One year has elapsed since the joinder of issue or six months have elapsed since the issuance of the preliminary court conference order where such an order has been issued, whichever is later;
- The court or party seeking such relief, as the case may be, has properly served a written demand to which the party against whom such relief is sought has not timely responded.

X. Disclosure

A. Scope of disclosure: CPLR 2301, 2302, 3101, 3103, 3108, 3119

The general scope of the right to disclosure extends to all matter that is material and necessary in the prosecution or defense of an action, regardless of the burden of proof (CPLR 3101 [a]). Such disclosure is obtainable from any party, including an officer, director, member, agent or employee of a party.

Disclosure is obtainable from a nonparty who is about to depart from the state, who is outside the state, who resides more than 100 miles from the place of trial, who is too sick or infirm to attend trial, or who is the treating doctor or trial expert of the party demanding disclosure (CPLR 3101 [a] [3]). Otherwise, disclosure from a nonparty must be upon notice to the opposing party stating the circumstances or reasons such disclosure is sought or required. This notice requirement is in addition to the requirement that a nonparty from whom discovery is sought be served with a subpoena (CPLR 3101 [a] [4]; *Kapon v Koch*, 23 NY3d 32 [2014]; CPLR 2301).

A subpoena requires the attendance of a nonparty witness to give testimony, and a subpoena duces tecum requires a nonparty’s production of documents (CPLR 2301). Subpoenas may be issued by, among others, the clerk of a court, a judge where there is no clerk, and the attorney of record of any party to an action, a special proceeding, an administrative proceeding, or an arbitration (CPLR 2302). This is in contrast with the federal practice of requiring the clerk to issue the subpoena (*See* Fed Rules Civ Pro rule 45). Persons and entities outside of New York are not subject to the subpoena power of a New York court (*Zeeck v Melina Taxi Co*., 177 AD2d 692, 694 [2d Dept 1991]). However, testimony and documents may be obtained from an out-of-state witness or document custodian if the witness or custodian is willing to cooperate. If the witness or custodian is not willing to cooperate, certain testimony and documents still may be obtained through either a commission or letters rogatory (CPLR 3108; *Wiseman v American Motors Sales Corp*., 103 AD2d 230 [2d Dept 1984]; *Laino v Cuprum S.A. de C.V*., 235 AD2d 25 [2d Dept 1997]), or by use of the procedures of the Uniform Interstate Deposition and Discovery Act, as embodied in CPLR 3119, in any of the many other states which have adopted that Act.

Immune from disclosure are privileged matter (CPLR 3101 [b]) (absolute immunity), work product of an attorney (*Id.* at [c]) (absolute immunity) and material prepared for litigation (*Id.* at [d] [2]) (conditional immunity - “only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent by other means").

Upon request, each party must identify each person whom the party expects to call as an expert witness at trial and disclose in reasonable detail the subject matter on which each expert is expected to testify, the substance of the facts and opinions on which each expert is expected to testify, the qualifications of each expert witness, and a summary of the grounds for each expert's opinion (CPLR 3101 [d]). The expert's report need not be disclosed nor may a deposition of the expert be taken in the absence of a court order issued upon a showing of special circumstances and subject to such restrictions and provisions as the court deems appropriate (CPLR 3101 [d] [iii]). However, a party, without court order, may depose a person authorized to practice medicine, dentistry, or podiatry who is that party's treating or retained expert, in which case the other party is entitled to full disclosure regarding that expert.

Special rules apply to experts in a medical, dental or podiatric malpractice actions (CPLR 3101 [d] [i] [ii]).

Any party may obtain a copy of the party's own statement which, for example, may be in the possession of another party or an insurer (CPLR 3101 [e]).

A defendant must provide to plaintiff, within 90 days after serving an answer, a copy of their insurance policy under which any person or entity may be liable to satisfy part or all of a judgment that may be entered in the action or to indemnify or reimburse for payments made to satisfy the entry of final judgment, unless the plaintiff agrees to accept the policy's declaration page instead (CPLR 3101 [f] [1]). Disclosing information concerning the insurance agreement does not deem that information admissible in evidence at trial (CPLR 3101 [f] [4]). These insurance disclosure requirements do not apply to actions brought to recover motor vehicle insurance personal injury protection benefits (CPLR 3101 [f] [5]).

Written accident reports prepared in the regular course of business operations or practices of any person, firm, corporation, association or other public or private entity must be disclosed, unless prepared by a police or peace officer for a criminal investigation or prosecution and disclosure would interfere with a criminal investigation or prosecution (CPLR 3101 [g]).

A party must amend or supplement a response previously given to a request for disclosure promptly upon the party's thereafter obtaining information that the response was incorrect or incomplete when made, or that the response, though correct and complete when made, no longer is correct and complete, and the circumstances are such that a failure to amend or supplement the response would be materially misleading (CPLR 3101 [h]).

A party may obtain full disclosure of any films, photographs, video tapes or audio tapes, including transcripts or memoranda thereof, involving another party (CPLR 3101 [i]). Disclosure under this section covers all portions of such material, including out-takes, rather than only those portions a party intends to use.

Although the CPLR does not specifically address the discovery of electronically stored information (ESI), e-discovery is generally permissible and the "material and necessary" requirement contained in CPLR 3101 applies to ESI (*e.g., Matter of Nunz*, 53 Misc3d 483 [Sur Ct., Erie County 2015]). Both the Rules of the Commercial Division of the Supreme Court and New York's Uniform Rules for the Trial Courts specifically contemplate discovery of ESI in an action and contain a list of relevant factors in determining the method and scope of electronic discovery (22 NYCRR 202.70 [g]; 22 NYCRR 202.12 [b]). These factors include identifying the potential types of ESI and the relevant time frame, the manner in which ESI is maintained and whether it is reasonably accessible, implementing a preservation plan for relevant ESI, the scope and form of production, the identification of privileged or confidential ESI, and the anticipated cost and burden of data recovery and the proposed allocation of such cost (22 NYCRR 202.70 [g] [Rule 8 (b)]; 22 NYCRR 202.12 [c] [3]). Some courts and bar associations have also provided working guidelines for discovery of ESI (*See e.g.,* New York State Supreme Court, Commercial Division, Nassau County, Guidelines for Discovery of Electronically Stored Information [ESI]), effective June 1, 2009, II [c] [4]); Best Practices in E-Discovery in New York State and Federal Courts, Version 2.0, Report of the E-Discovery Committee of the Commercial and Federal Litigation Section of the New York State Bar Association at 20 [Dec 2012]; *Tener v Cremer,* 89 AD3d 75 [1st Dept 2011]).

The scope of discovery may include all information from social media websites, such as Facebook, that is material and necessary, irrespective of any privacy settings utilized on the account (*Forman v Henkin*, 30 NY3d 656 [2018]). Requests for social media data should be tailored to the nature of the controversy at issue and limited in time, as appropriate to the specific circumstances of the case (*See Doe v The Bronx Preparatory Charter School,* 160 AD3d 591 [1st Dept 2008]).

CPLR 3103 (a) permits any party or nonparty from whom discovery is sought to move for a protective order denying, limiting, conditioning or regulating the use of any disclosure device to prevent "unreasonable annoyance, expenses, harassment, disadvantage, or other prejudice."

B. Methods of obtaining disclosure: CPLR 3102

Disclosure may be obtained by stipulation or on notice without leave of court unless otherwise provided by the CPLR or court rule. For example, leave of court is required for disclosure before an action is commenced to aid in bringing an action, to preserve information or to aid in arbitration (CPLR 3102 [b]), for a deposition of a party before that party's time to serve a responsive pleading has expired (CPLR 3106 [a]), and for disclosure during or after trial (CPLR 3102 [c]).

Disclosure may be obtained by one or more of the following devices:

1. Depositions upon oral question: CPLR 3107; 22 NYCRR 202.20-b

If the parties have not agreed by stipulation, the party desiring to take the deposition of any person shall give each other party 20 days' notice of the time and place of taking the deposition. A party noticed to be examined may serve notice of at least 10 days for the examination of any other party, such examination to follow at the same time and place. Unless stipulated by the parties or altered by the court for good cause shown, there are limitations on the number of depositions taken by a party and the duration of each deposition (22 NYCRR 202.20-b).

2. Depositions upon written questions: CPLR 3018

A deposition may be taken on written questions when the examining party and the deponent so stipulate or when the testimony is to be taken without the state.

3. Interrogatories: CPLR 3130; 22 NYCRR 202.20

Any party in an action may serve upon any other party written interrogatories, subject to three limitations: (1) interrogatories cannot be used if a bill of particulars is demanded of the same party; (2) in an action seeking damages for personal injury, property damage or wrongful death predicated solely on a cause of action for negligence, interrogatories cannot be used without leave of court if a deposition is conducted of the same party; and (3) interrogatories are limited to 25 in number, including subparts, unless the parties agree or the court orders otherwise (22 NYCRR 202.20). Special rules apply in matrimonial actions.

4. Demands for addresses: CPLR 3118

A party may serve on any other party a written notice demanding a verified (*See* Appendix C) statement setting forth the post office address and residence of the party, of any specified officer or member of the party and of any person who formerly possessed and assigned a cause of action or defense which is being asserted in the action.

5. Discovery and inspection of documents or property: CPLR 3120

After commencement of an action, a party may serve a notice on any other party or a subpoena duces tecum on any other person: (a) to produce and permit the party seeking discovery, or someone acting on his or her behalf, to inspect, copy, test or photograph any designated documents or any things which are in the possession, custody or control of the party or person served; or (b) to permit entry upon designated land or other property in the possession, custody or control of the party or person served for the purpose of inspecting, measuring, surveying, sampling, testing, photographing or recording by motion pictures or otherwise the property or any specifically designated object or operation thereon.

6. Physical and mental examinations: CPLR 3121

After commencement of an action in which the mental or physical condition or the blood relationship of a party, or of an agent, employee or person in the custody or under the legal control of a party, is in controversy, any party may serve notice on another party to submit to a physical, mental or blood examination by a designated physician, or to produce for such examination his agent, employee or the person in his custody or under his legal control.

7. Notice to admit: CPLR 3123

A party may timely serve upon any other party a written request for admission by the latter of the genuineness of any papers or documents, or the correctness or fairness of representation of any photographs, or of the truth of any matters of fact set forth in the request, as to which the party requesting the admission reasonably believes there can be no substantial dispute at the trial and which are within the knowledge of such other party or can be ascertained by him upon reasonable inquiry. A party may not seek an admission of something that is an ultimate issue in the dispute, such as negligence or other fault (*See Glasser v City of New York,* 265 AD2d 526 [2d Dept 1999]; *Midland Funding LLC v Valentin,* 40 Misc3d 266, 268 [Dist. Ct., Nassau County 2013). "A notice to admit which goes to the heart of the matter at issue is improper" (*DeSilva v. Rosenberg*, 236 AD2d 508, 508 [2d Dept 1997]).

Each of the matters of which an admission is requested shall be deemed admitted unless the party to whom the request is directed timely serves upon the party requesting the admission a sworn statement either denying specifically the matters of which an admission is requested; setting forth in detail the reasons why he cannot truthfully either admit or deny those matters; or setting forth a claim that the matters of which an admission is requested cannot be fairly admitted without some material qualification or explanation, or that the matters constitute a trade secret or that such party would be privileged or disqualified from testifying as a witness concerning them. If the party from whom an admission is requested does not admit, that party may be held liable the reasonable expenses incurred in proving such matter of fact, including reasonable attorney's fees.

XI. Special Proceedings

A. Generally: CPLR 401, 402, 403, 404, 408

A special proceeding is used to establish a right or enforce an obligation in certain civil matters in an expedited fashion. Statutory authorization must exist for the use of a special proceeding. The most common special proceedings are proceedings against a body or officer (CPLR Article 78, *see* Civil Practice and Procedure, X.B.), a summary proceeding to recover possession of real property (RPAPL art 7, *see* Real Property I.H.), and the first application arising out of an arbitrable controversy (CPLR Article 75, *see* Civil Practice and Procedure, XI.A.).

The party who initiates a special proceeding is called the petitioner and the adversary, if any, is the respondent. Leave of court is required to join any other parties (CPLR 401).

The pleadings are a petition, an answer (if there is an adverse party as is usual), and a reply.

A reply is required if the answer contains a counterclaim denominated as such, and unlike in an action a reply is permitted to respond to any new matter in the answer. Any additional pleadings require leave of court (CPLR 402).

The commencement of a special proceeding requires the filing (except in town and village justice courts, *see* Civil Practice and Procedure, III.A.) of a petition, which must be served on the respondent with a notice of petition. Service must be made in the same manner as a summons in an action. The notice of petition serves to notify the respondent of the time and place of the return date on the petition (CPLR 403 [a]). In addition to specifying the return date, the notice of petition must identify the affidavits, if any, that are being submitted in support of the petition.

The time required for service of the pleadings is akin to those for the service of motion papers. The petition and notice of petition must be served at least 8 days before the date when the proceeding is to be heard. The answer and any supporting affidavits must then be served at least 2 days before the date when the proceeding is to be heard. Any reply with any supporting affidavits must be served when the proceeding is to be heard. But the answer must be served at least 7 days before the date when the proceeding is to be heard if the petition and notice of petition is served at least 12 days before the date when the proceeding is to be heard and so demands, in which case any reply must be served at least 1 day before the date when the proceeding is to be heard. (*Cf.* Civil and Procedure, X.B. for times applicable to Article 78 proceedings.)

As an alternative to a notice of petition, CPLR 403 (d) allows the use of an order to show cause (*See* Civil Practice and Procedure VII.A.).

The respondent may raise an objection in point of law - a defense that can produce a summary dismissal of the proceeding - either in the answer or in a motion to dismiss made within the time allowed for answer (CPLR 404).

Pretrial disclosure is generally not available without leave of court, except for a notice to admit under CPLR 3123 (*See* Civil Practice and Procedure, IX.B.7.; CPLR 408).

B. Proceeding against body or officer: CPLR 7801, 7802, 7803, 7804

Article 78 of the CPLR governs the procedure for judicial review of matters that were recognized at common law under the common law writs of certiorari, mandamus and prohibition. Article 78 is the vehicle for judicial review of most administrative actions in New York. The determination sought to be reviewed must be final, and the petitioner must exhaust his or her administrative remedies before seeking judicial relief (CPLR 7801).

“Body or officer” is defined as including every court, tribunal, board, corporation, officer, or other person, or aggregation of persons, whose action may be affected by an Article 78 proceeding (CPLR 7802). In most, but not all, cases this means governmental officers and agencies. For example, an Article 78 proceeding in the nature of mandamus is the proper remedy to compel the management of a private corporation to comply with the corporation’s by-laws regarding corporate governance (*e.g.*, *Auer v Dressel*, 306 NY 427 [1954]).

CPLR 7803 contains a list of issues that may be raised in an Article 78 proceeding:

- Whether a body or officer has failed to perform a duty enjoined by law;
- Whether a body or officer has proceeded, is proceeding or is about to proceed without or in excess of jurisdiction;
- Whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion; or
- Whether a determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law is, on the entire record, supported by substantial evidence.

An Article 78 proceeding is a special proceeding and is governed by the procedures of CPLR Article 4 except as otherwise may be provided in Article 78.

An Article 78 proceeding must be commenced in supreme court (CPLR 7804 [b]). It is commenced by filing a petition with the clerk of the court of the county in which the proceeding is commenced (CPLR 7804 [d]). The statute of limitations for an Article 78 proceeding is four months after the determination to be reviewed becomes final and binding upon the petitioner, or after the respondent's refusal, upon demand, to perform its duty, unless a shorter time is provided in the law authorizing the proceeding (*See* Civil Practice and Procedure, IV.A.).

Unless the court has granted an order to show cause specifying the time and manner of service, the notice of petition together with the petition and supporting affidavits must be served on any adverse party at least 20 days before the petition is to be heard, the answer with any supporting affidavits must be served at least 5 days before such time, and any reply with any supporting affidavits must be served at least 1 day before such time (CPLR 7803 [c]).

The petition and answer in an Article 78 proceeding must be verified (CPLR 7804 [d], *see* Appendix C). The petition may be accompanied by affidavits or other written proof. The answer must state the facts showing the grounds for the respondent's action of which the petitioner complains. A certified transcript of the record of proceedings being challenged by the petitioner must be filed with the answer. Affidavits or other written proof may be submitted as evidentiary support for the respondent's position. A reply must be served in response to any counterclaim designated as such and to any other new matter raised in the answer, and also if the accuracy of any record of proceedings annexed to the answer is disputed.

Objections in point of law may be raised either in the answer or in a motion to dismiss made within the time allowed for the answer (CPLR 7804 [f]).

Pursuant to CPLR 7804 (g), on the return date of the petition for an Article 78 proceeding brought on the ground that an agency's determination, made as a result of a hearing held at which evidence was taken, was not supported by substantial evidence, the court will first dispose of any objection that could terminate the proceeding, including but not limited to lack of jurisdiction, statute of limitations and res judicata, without reaching the substantial evidence issue. If the determination of any such objection does not terminate the proceeding, the court will order the proceeding transferred to the Appellate Division for resolution.

On the return date of the petition for an Article 78 proceeding brought on any other ground, the court will dispose of the case as it would a motion for summary judgment. If the pleadings, affidavits and other written proof submitted by the parties raise no triable issue of fact, the court will decide the case on the papers and grant judgment as a matter of law for the prevailing party. If a triable issue of fact is raised, the court shall try it forthwith (CPLR 7804 [g] – [h]).

XII. Alternative Dispute Resolution

A. Arbitration: CPLR 7501, 7502, 7503, 7506, 7510, 7511

Arbitration is a procedure for resolving a dispute by referring the dispute to an impartial arbitrator (or panel of arbitrators) chosen by the parties to hear evidence and arguments from each side and then decide the outcome. Arbitration is less formal than a trial and is generally, by agreement of the parties, either binding or nonbinding.

Written agreements to submit a controversy to arbitration are enforceable and will be enforced by the courts without regard to the merits of the underlying claim (CPLR 7501). A party seeking to resist arbitration may do so only upon three grounds: (1) that no valid agreement was made to arbitrate the issue in question; (2) that a condition precedent in the agreement has not been complied with; or (3) that the claim is barred by the statute of limitations (CPLR 7503 [a], 7502 [b]). In the absence of one of the above enumerated defenses to arbitration, the court shall direct the parties to arbitrate. Courts are expressly prohibited under CPLR 7501 from determining whether a claim sought to be arbitrated is tenable, or otherwise passing upon the merits of the dispute.

A party initiates arbitration by serving upon the other party a demand for arbitration or notice of intention to arbitrate or by applying to the court for an order compelling arbitration (CPLR 7503 [a]). The notice of intention to arbitrate or demand to arbitrate must specify the agreement pursuant to which arbitration is sought, the name and address of the party serving the notice, and state that unless the party served applies to stay the arbitration within 20 days after such service, the party will be precluded from objecting that a valid agreement was not made or has not been complied with and from asserting a limitations bar. The notice or demand must be served in the same manner as a summons or by registered or certified mail, return receipt requested (CPLR 7503 [c]).

An application to stay arbitration must be made by the party served with a demand for arbitration or notice of intention to arbitrate within 20 days after service of the notice or demand or is precluded. Notice of the application to stay must also be served in the same manner as the notice of intent to arbitrate (CPLR 7503 [c]). Any provision in an arbitration agreement or arbitration rules that waives the right to apply for a stay of arbitration is void.

A party wishing to resist arbitration may apply to stay the arbitration upon any of the three enumerated grounds. If the party has been served with a demand for arbitration or notice of intent to arbitrate compliant with CPLR 7503 (c), the opposing party must timely move for a stay raising the said grounds or they are waived (CPLR 7503 [1]). A limitations defense, however, may still be asserted before the arbitrator, who has the discretion whether or not to apply the bar (CPLR 7502 [b]). If the limitations defense is decided by the arbitrator, it cannot be later asserted as a basis to vacate or modify an award. If the demand for arbitration fails to comply with the formalities of CPLR 7503 (c), and the aggrieved party did not participate in the arbitration, the said grounds are not waived and can still be raised in a motion to vacate an award (*Blamowski v Munson Transportation, Inc.,* 91 NY2d 190 [1997]).

A special proceeding is used to bring before the court the first application arising out of an arbitrable controversy which is not made by motion in a related pending action (CPLR 7502 [a], 7503 [a]).

The provisional remedies of attachment and preliminary injunction are available in connection with a pending arbitration, but only upon the ground that the award to which the applicant may be entitled may be rendered ineffectual without such provisional relief (CPLR 7502 [c]).

The arbitrator must be sworn before hearing a dispute, and the parties are entitled to be heard, to present evidence and to cross-examine witnesses. Arbitrators are not bound by the rules of evidence that apply in judicial proceedings (*Matter of Silverman [Benmor Coats]*, 61 NY2d 299, 308 [1984]). Each party has a non-waivable right to be represented by counsel throughout the arbitration proceeding (CPLR 7506).

An arbitration award is not enforceable as a judgment unless an application to confirm an award is made within one year after delivery of the award to the moving party (CPLR 7510). An application to vacate or modify an award must be made within 90 days after delivery of the award to the moving party (CPLR 7511 [a]).

If the parties have agreed that the arbitration is to be nonbinding so that the decision of the arbitrator is to be advisory only, the arbitration may still be compelled (*Board of Education v Cracovia*, 36 AD2d 851 [2d Dept 1971]), but any award may not be properly confirmed against a party who rejects it (*Carter v County of Nassau*, 8 AD3d 603 [2d Dept 2004]).

Judicial review of arbitration awards is extremely limited, and an award will not be vacated for an arbitrator's errors of law and fact (*Wien & Malkin LLP v Helmsley-Spear, Inc.,* 6 NY3d 471 [2006]). CPLR 7511 governs the grounds for moving to vacate or modify an arbitration award. Where the aggrieved party participated in the arbitration or was served with a notice of intention to arbitrate, and was prejudiced by the particular impropriety, there are four narrow grounds for vacating an arbitration award (misconduct in procuring the award, bias of the arbitrator, excess of power by the arbitrator, and procedural defects (CPLR 7511 [b] [1]). If the aggrieved party did not participate in the arbitration, or was not served with a notice of intention to arbitrate, or was served with a notice which did not comply with CPLR 7503 (c), the grounds for vacatur include all of those mentioned above and the added grounds of non-arbitrability, noncompliance with the arbitration agreement and the statute of limitations (CPLR 7511 [2]). There are three grounds for modification of an award pursuant to CPLR 7511 (c): (1) miscalculation of figures or mistake in the description of persons, things or property; (2) determination of matters not within the submission to arbitrate; and (3) imperfection in matters of form not affecting the merits. Upon vacating an award, the court may order a rehearing (CPLR 7511 [d]).

B. Mediation

Mediation is a form of alternative dispute resolution used to resolve disputes between two or more parties. A third-party neutral mediator does not decide the case but assists the parties to reach a mutually acceptable agreement. Mediation may be inappropriate if one party is unwilling to compromise or has a significant advantage in power or control over the other party, such as if the parties have a history of abuse. The process is private and confidential. Mediation is less formal than a trial, allows the parties to communicate freely and participate fully in the process, and is less expensive than litigation.

C. Other forms of alternative dispute resolution (ADR)

Other forms of ADR include, among other methods, neutral evaluation, collaborative law, and summary jury trials (*See* http://www.nycourts.gov/ip/adr/What_Is_ADR.shtml).

In neutral evaluation, the parties present their case to an evaluator, who is often an expert in the subject matter in dispute. The evaluator gives an opinion of the strengths and weaknesses of each party's evidence and arguments and offers an opinion of the likely outcome in court.

Collaborative law is a legal process enabling married couples who have decided to divorce a way to do so in a cost-efficient manner without going to court, while retaining the professional guidance of their own attorneys. The couples bind themselves to the process and disqualify their respective lawyers in the event either party decides to go to court.

Summary jury trials permit adversaries to present their case in an abbreviated form to a mock jury which reaches a verdict that is advisory only, unless the parties agree to make it binding. A summary jury trial gives litigants a preview of a potential verdict should the case go to trial.

New York courts are implementing a system-wide program of alternative dispute resolution. Parties in a broad range of civil cases will be referred to mediation or some other form of alternative dispute resolution at the onset of the case. The court system will introduce and expand court-sponsored mediation programs, particularly early mediation through automatic presumptive referrals in identified types of civil disputes, with local protocols, guidelines and best practices to be developed in each jurisdiction to facilitate the process. Practitioners should check applicable court rules regarding ADR.

XIII. Request for Judicial Intervention, Trials

A. Request for Judicial Intervention: 22 NYCRR 202.6

The first time any one of the parties to an action or proceeding seeks any relief from a court, whether by bringing a motion, filing a note of issue or otherwise, the party must file a request for judicial intervention and in most cases pay the required fee in order for the case to be assigned to a judge. Only one request for judicial intervention is filed in an action.

B. Note of Issue and Certificate of Readiness: 22 NYCRR 202.21

In order to proceed to a trial in a civil action, a party must file a note of issue and certificate of readiness with the clerk of the court, pay the required fee, and serve the documents on all parties. By filing a note of issue, the party is representing to the court that discovery is complete and the case is ready for trial.

C. Demand and waiver of trial by jury: CPLR 4101, 4102

Generally speaking, trial by jury is available in actions at law and not available in actions involving claims in equity. CPLR 4101 (1) provides that unless a jury trial is waived issues of fact shall be tried by a jury in:

- An action for a sum of money only;
- An action of ejectment, for abatement of and damages for a nuisance, or to quiet title to real property pursuant to Real Property Actions and Proceedings Law Article 15; or
- Any other action in which a party is entitled by the constitution or by express provision of law to a trial by jury.

Any party may demand a trial by jury by serving upon all other parties and filing a note of issue containing a demand for trial by jury. Any party served with a note of issue not containing such a demand may demand a trial by jury by serving upon each party a demand for a trial by jury and filing such demand in the office where the note of issue was filed within 15 days after service of the note of issue (CPLR 4102 [a]). If no party demands a trial by jury, the right to trial by jury is deemed waived by all parties subject to the court's power to relieve a party from the effect of noncompliance based on the absence of undue prejudice to the other party (*Id.* at [e]).

D. Number of jurors and verdicts: CPLR 4104, 4113

A jury in a civil case must consist of six persons (CPLR 4104). A verdict must be rendered by not less than five-sixths of the jurors constituting a jury (CPLR 4113).

E. Peremptory challenges, challenges for cause, and alternate jurors: CPLR 4106, 4109, 4110

Pursuant to CPLR Article 41, each party has a right to interpose both peremptory challenges and challenges for cause (CPLR 4109, 4110). A peremptory challenge is an objection to a prospective juror for which no reason need be assigned. Peremptory challenges are limited in number and cannot be used to exclude a juror for discriminatory reasons.

A challenge for cause, which may be made as often as necessary, is an objection that a prospective juror or alternate juror is unable to be impartial for a particular reason. Lawyers may stipulate to excuse a juror challenged for cause or the challenge is decided by the court. CPLR 4110 enumerates the following grounds for challenge, which grounds are not exhaustive:

- That a juror is in the employ of a party to the action;
- If a party to the action is a corporation, that the juror is a shareholder or a stockholder therein;
- In an action for damages to person or property, that the juror is a shareholder, stockholder, director, officer, or employee, or in any manner interested in any insurance company issuing policies for protection against liability for damages for injury to persons or property; and
- That a juror is related within the sixth degree by consanguinity or affinity to a party.

The fact that a juror is a resident or taxpayer of a city, village, town or county which is a party to the action is not a ground for challenge.

At the time of jury selection, one or more alternate jurors are chosen to participate in the trial to the same extent as a regular juror and to serve until the submission of the case to the jury. When the case is submitted, the court may retain the alternate jurors to ensure availability if a regular juror becomes unable to perform the duties of a juror or may dismiss the alternate jurors (CPLR 4106).

F. Instructions to jury, objection: CPLR 4110-b

Any party may file written requests that the court instruct the jury on the law as set forth in the requests. No party may assign as error on appeal the court's giving or failing to give an instruction unless he objects thereto before the jury retires to consider its verdict.

XIV. Appeals

A. Taking an appeal: CPLR 5512, 5515

An initial appeal is taken from a judgment or order of the court of original instance, and an appeal seeking review of an appellate determination is taken from the order of the appellate court. No appeal may be taken from a decision, verdict or ruling by itself.

Unlike federal procedure, an appeal as of right may be taken from almost any interlocutory order of the court of original instance.

An appeal is taken by serving on the adverse party a notice of appeal and filing it in the office where the judgment or order of the court of original instance is entered. Where an order grants permission to take an appeal, the appeal is taken when such order is entered. A notice of appeal must contain the name of the party taking the appeal, the judgment or order or specific part thereof appealed from, and the court to which the appeal is taken.

B. Time to take appeal: CPLR 5513

An appeal as of right must be taken within 30 days after service by a party upon the appellant of a copy of the judgment or order appealed from and written notice of its entry (CPLR 5513 [a]). A motion for permission to appeal must also be made within 30 days, computed from the date of service by a party upon the person seeking leave to appeal of a copy of the judgment or order to be appealed from and written notice of its entry (CPLR 5513 [b]).

If service is made by mail or overnight delivery service, the additional time allowed for service of papers by such means applies (*See* Civil Practice and Procedure, VIII.C.).

If the successful party fails or delays in serving a copy of the judgment or order with written notice of its entry, the appellant may serve it on the successful party, and the time to appeal then runs from that service.

The time within which to take an appeal is mandatory and strictly enforced. Extensions of the time are permitted in very limited circumstances, including if before the time to appeal expires the appellant's attorney dies, is removed or suspended, or becomes physically or mentally incapacitated or otherwise disabled (CPLR 5514 [b]), or if there an event permitting substitution of a party, such as the death of a party (CPLR 1022).

C. Appeals to the Appellate Division: CPLR 5701, 5702, 5703

Almost all final and non-final judgments and intermediate orders are appealable as of right to the Appellate Division, provided the intermediate order results from a motion made on notice. The Appellate Division hears appeals from Supreme Court, County Court, Family Court, Surrogate's Court and the Court of Claims, and, by permission, from an Appellate Term.

Although an ex parte order, that is, an order resulting from a motion not made on notice, is not appealable, an aggrieved party may move, on notice to the party who obtained the order, to vacate the ex parte order and then appeal from an order denying that motion (CPLR 5701 [a] [3]).

D. Appeals to the Court of Appeals: CPLR 5601, 5602

An appeal may be taken to the Court of Appeals as of right from any order of the Appellate Division that finally determines an action originating in the Supreme Court, a County Court, Surrogate's Court, Family Court, the Court of Claims, or an administrative agency, where there is dissent by at least two justices on a question of law (CPLR 5601).

An appeal as of right to the Court of Appeals is also available from an Appellate Division order that finally determines the action where there is directly involved the construction of the New York or federal constitution (CPLR 5601 [1]) or from a judgment of a court of original instance that finally determines an action where the only question involved on the appeal is the constitutional validity of a New York or federal statute (CPLR 5601 [2]).

An appeal may be taken to the Court of Appeals by permission of the Appellate Division granted before application to the Court of Appeals, or by permission of the Court of Appeals upon refusal by the Appellate Division, or upon direct application to the Court of Appeals, from any order of the Appellate Division not appealable as of right that finally determines an action originating in the Supreme Court, a County Court, a Surrogate's Court, the Family Court, the Court of Claims, or an administrative agency (CPLR 5602). Certain other appeals may be taken to the Court of Appeals only by permission of the Appellate Division, including an appeal from an order of the Appellate Division that finally determines an action originating in a court other than Supreme Court, County Court, Family Court, Surrogate's Court and the Court of Claims, or an administrative agency and that is not appealable as of right on constitutional grounds (CPLR 5602 [b] [2] [i]).

E. Scope of review: CPLR 5501

An appeal from an intermediate order brings up only those issues determined by the order. If an appellant appeals from only part of such an order, any further appeal from any other part is waived (*Royal v Brooklyn Union Gas Co.*, 122 AD2d 132 [2d Dept 1986]).

An appeal from a final judgment brings up for review any non-final judgment or order which necessarily affects the final judgment, provided that such non-final judgment or order has not previously been reviewed by the appellate court. An appeal also brings up for review all incidental rulings made at the trial, including evidentiary rulings, provided the appellant objected or there was no opportunity to object (*See* CPLR 4017).

The Appellate Division and the Appellate Terms on an appeal review both questions of law and questions of fact.

The Court of Appeals reviews questions of law only, except that it will also review questions of fact where the Appellate Division, on reversing or modifying a final or interlocutory judgment, has expressly or impliedly found new facts and a final judgment has been entered based on those new facts.

CONFLICT OF LAWS

I. Application in Specific Areas

A. Torts

In the context of tort law, New York uses an interest analysis to determine which of two competing jurisdictions has the greater interest in having its law applied. Under the interest analysis, courts assess two factors: "(1) what are the significant contacts and in which jurisdiction are they located; and (2) whether the purpose of the law [at issue] is to regulate conduct or allocate loss" (*Padula v Lilarn Props. Corp.*, 84 NY2d 519, 521 [1994]).

Conduct-regulating rules govern conduct to prevent injuries from occurring. Loss-allocating rules prohibit, assign, or limit liability after the tort occurs.

If conflicting conduct-regulating laws are at issue, the jurisdiction where the tort occurred has the greatest interest in regulating conduct within its borders. Conduct-regulating rules include rules of the road for motor vehicles and construction safety standards such as Labor Law §§ 240, 241 (*See* Torts and Torts Damages, I.A.F.) (*Padula v Lilarn Properties Corp.*, 84 NY2d 519 [1994]).

If conflicting loss-allocating rules are at issue, other factors are taken into consideration, in particular, the parties' domicile. In *Neumeier v Kuehner,* 31 NY2d 121, 128 [1972]), the Court of Appeals adopted three rules that apply to loss-allocation cases.

Under the first rule, when the parties to the lawsuit share a common domicile, the loss-allocation rule of the common domicile will apply.

The second rule applies in certain circumstances when the parties are domiciled in different states and the local law favors the one of them. If a defendant's conduct occurred in the state of his or her domicile and that state would not impose liability, the defendant will not be exposed to liability under the law of the victim's domicile. Conversely, if the plaintiff is injured in the place of his or her domicile and would be entitled to recover in that state, the defendant should generally be unable to interpose the law of his or her domicile to defeat recovery.

For situations not covered by the first two rules, the third *Neumeier* rule provides that most of the time the governing law will be that of the place where the accident occurred, unless "displacing that normally applicable rule will advance the relevant substantive law purposes without impairing the smooth working of the multistate system or producing great uncertainty for litigants" (*Id.* at 128).

Loss-allocating rules to which the *Neumeier* rules apply include motor vehicle guest statues, charitable immunity statutes, wrongful death statutes, vicarious liability statutes, and contribution rules (*See Padula, supra* and cases therein cited).

B. Contracts

1. Contractual provisions: General Obligations Law (GOL) §§ 5-1401, 5-1402

Contractual provisions that the law of a particular jurisdiction will govern the contract will generally be honored and enforced "unless the jurisdiction whose law is to be applied has no reasonable relation to the agreement at issue or enforcement of the subject provision would violate a fundamental public policy of this State" (*Eastern Artificial Insemination Coop. v La Bare*, 210 AD2d 609, 610 [3d Dept 1994]).

However, GOL 5-1401 provides that the parties to a contract involving not less than $250,000 may agree that the law of New York shall govern their rights and duties in whole or in part, whether or not such contract bears a reasonable relation to New York. This statute does not apply to a contract (a) for labor or personal services, (b) relating to any transaction for personal, family or household services, or (c) covered by one of various specific provisions of the Uniform Commercial Code (*See* UCC § 1 - 301 [c]).

Furthermore, GOL 5-1402 expressly provides that if a contract contains a provision choosing New York law pursuant to GOL 5-1401 and involves at least $1,000,000, and contains a provision whereby a foreign corporation, non-resident or foreign state agrees to submit to the jurisdiction of the New York courts, any person may maintain an action or proceeding against such foreign corporation or non-resident in New York. And CPLR 327 (b) expressly provides that a court shall not stay or dismiss any action on the ground of inconvenient forum, where the action arises out of or a contract to which GOL 5-1402 law applies.

2. Absent a contractual provision

In New York, courts have applied a flexible "center of gravity" or "grouping of contacts" inquiry to conflict of law questions relating to contracts not containing a contractual provision regarding the law to be applied (*Auten v Auten*, 308 NY 155, 156 [1954]). Under this approach, the "spectrum of significant contacts" is considered in order to determine which state has the most significant contacts to the particular contract dispute (*Matter of Allstate Ins. Co. [Stolarz-New Jersey Mfrs. Ins. Co.]*, 81 NY2d 219, 226 [1993]). In general, significant contacts involve:

- The places of contracting, negotiation and performance;
- The location of the subject matter of the contract; and
- The domicile or place of business of the contracting parties.

In addition, when "the policies underlying conflicting laws in a contract dispute are readily identifiable and reflect strong governmental interests," those governmental interests may be considered (*Id.*).

C. Estates: EPTL 3-5.1

In matters relating to wills that dispose of real property, or the manner in which such property descends in intestacy, the law ("law" as used in the statute, without saying "local law," means including conflict-of-law rules) of the jurisdiction where the real property is located governs (EPTL 3–5.1 [b] [1]). In matters relating to wills that dispose of personal property, or the manner in which such property devolves in intestacy, the law of the jurisdiction in which the decedent was domiciled at death governs (EPTL 3–5.1 [b] [2]). If an issue arises as to whether property is real or personal, the law of the state where the asset is located is determinative.

A will is formally valid (and therefore admissible to probate in New York) if it was in writing and signed by the testator, and is otherwise executed and attested in accordance with the local law (that is, not including conflict-of-law rules) of either New York (*See* Trusts, Wills and Estates, II.A.), or the jurisdiction in which the will was executed at the time of execution, the testator was domiciled at the time of execution, or the testator was domiciled at the time of death (EPTL 3-5.1 [c]).

II. Limitations on Application of Foreign Law

A. Substantive/procedural dichotomies

When New York is the forum state, its own law normally determines whether a foreign law is procedural or substantive and the foreign jurisdiction's designation of the rule as procedural or substantive is not dispositive (*Davis v Scottish Re Group Limited,* 30 NY3d 247 [2017]). Under New York's choice of law rules, if the foreign law is determined to be procedural, New York courts will not apply it because procedural rules are governed by the law of the forum. If the foreign law is determined to be substantive, the New York courts will be required to apply it.

Thus, a New York court will apply New York choice of law principles to determine whether a foreign state time limit is a substantive or procedural rule (*Tanges v Heidelberg N. Am.*, 93 NY2d 48 [1999]). If the time limit is a substantive law of the other state, New York courts will apply the time limit of that state, whereas if the time limit is a procedural rule of the other state, New York will apply its own procedural rule. A normal statute of limitations, which prevents a plaintiff from delaying an action to the detriment of a potential defendant, is considered a procedural rule. On the other hand, a statute that imposes a time limit which blocks a cause of action before it may accrue is considered a "statute of repose" and a substantive rule. If a statute creates a cause of action and integrates into it a time limit to bring an action, so as to qualify the right, the time limit is an ingredient of the cause of action and, thus, a substantive rule.

For example, *Tanges, supra,* involved a Connecticut statute which prohibited a products liability cause of action from being brought against a party later than ten years after the party last parted with possession or control of the product. Because the ten-year period began to run even before a cause of action accrued and because the statute was part of legislation intended to supplant any common law causes of action for products liability, the court determined it to be a substantive statute of repose, even though Connecticut courts would appear to consider it procedural.

B. Local public policy

A statute or rule of another state that gives the courts of that state exclusive jurisdiction over certain cases does not divest New York courts of jurisdiction (*Sachs v Adeli*, 26 AD3d 52 [1st Dept 2005]). Under the doctrine of comity, in cases of conflict between foreign legislation and New York law, New York may voluntarily defer to the policy of another state or jurisdiction but is not bound to do so (*Ehrlich-Bober & Co. v Univ. of Houston*, 49 NY2d 574, 580–81 [1980]) (internal citations omitted). Moreover, New York courts will not grant comity when it conflicts with the public policy of the State (*Id.*). The public policy exception permits courts to refuse to enforce otherwise applicable foreign law that would violate some fundamental principle of justice, prevalent conception of good morals, or deep-rooted tradition of the common weal (*Loucks v Standard Oil Co. of N.Y.,* 224 NY 99 [1918]).

CONTRACTS

I. Mutual Mistake vs. Unilateral Mistake

Generally, a contract entered into under a mutual mistake of fact by the parties is voidable and subject to rescission or reformation (*Matter of Gould v Board of Educ. of Sewanhaka Cent. High School Dist.*, 81 NY2d 446 [1993]). The mistake must be so material that it goes to the foundation of the agreement. The mutual mistake must exist at the time the contract is entered into and must be substantial, and any court-ordered relief is reserved only for "exceptional situations" (*Simkin v Blank*, 19 NY3d 46, 52 [2012]).

A unilateral mistake alone is an insufficient basis for reformation or rescission, in the absence of a showing of fraud, duress or similar inequitable conduct (*Barclay Arms v Barclay Arms Assoc.*, 74 NY2d 644 [1978]; *Village of Waterford v Camproni*, 200 AD2d 930 [3d Dept 1994]). To be successful, the party alleging the unilateral mistake must also show:

- that the mistake was material;
- that the mistake was made unknowingly despite the exercise of ordinary care;
- that enforcement of the contract would be unconscionable and would result in unjust enrichment of one party at the expense of the other; and
- that the parties can be returned to the status quo without prejudice

(Cox v Lehman Bros., 15 AD3d 239 [2005]); *Long v Fitzgerald*, 240 AD2d 971 [3d Dept 1997]; *Desiderado v N & A Taxi, Inc.*, 190 AD2d 250 [1993]; *Morey v Sings*, 174 AD2d 870 [1991]).

II. Inability to Consent, Including Infancy: GOL 1-202, 3-101

In New York, a person who is under the age of 18 is an infant (GOL 1-202; 3-101). A contract entered into by an infant is not void, but is voidable at the infant's election, and until an infant disaffirms the contract, it is binding on the infant and the other contracting party (*Sternlieb v Normandie Nat'l Sec. Corp.*, 263 NY 245 [1934]). An infant may disaffirm a contract during infancy or within a reasonable time after coming of age (*Horowitz v Manufacturers' Trust Co.,* 239 AD 693 [1st Dept 1934]).

The common law right of infants to disaffirm has been abrogated by various statutes (*Shields v Gross*, 58 NY2d 338 [1983]), including Civil Rights Law §§ 50, 51 (infant's contract consenting to the use of the infant's name or image for advertising purposes); GOL 3-101 (3) (married infant's contract to borrow money to purchase a home); GOL 3-102 (married infant's obligation for hospital, medical and surgical treatment and care for infant or infant's children); Education Law § 281 (contract for college loan to infant who has attained age of 16); Arts and Cultural Affairs Law § 35.03 (court-approved infants' contracts as performing artists and professional athletes) and Insurance Law § 3207 (1) (certain life insurance policies obtained by infants above the age of 14 years and 6 months).

III. Unconscionability and Illegality: General Business Law § 349; GOL 5-401, 5-501, 5-321, 5-322.1, 5-323, 5-325, 5-326

The determination of unconscionability is a matter of law for the court to decide. In general, unconscionability requires some showing of an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party. The party must demonstrate that the contract was both procedurally and substantively unconscionable when made.

The substantive aspect considers whether the contract terms are unreasonably favorable to one party. The procedural aspect looks to evidence of the contract formation process. In order to determine whether there has been procedural unconscionability in the contract formation process, a court must assess such factors such as:

- The size and commercial setting of the transaction,
- Whether there was a "lack of meaningful choice" by the party claiming unconscionability;
- Whether deceptive or high-pressured tactics were employed,
- The use of fine print in the contract,
- The "experience and education of the party claiming unconscionability," and
- Whether there was "disparity in bargaining power"

(*Gillman v Chase Manhattan Bank*, 73 NY2d 1, 11 [1988]).

Under New York law, agreements that are contrary to public policy are generally unenforceable. For example, General Business Law § 349 prohibits deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service to a consumer. To establish a claim under section 349, a plaintiff must allege that a defendant is engaging in consumer-oriented conduct which is materially deceptive or misleading, and, as a result, the plaintiff has been injured (*Stutman v Chemical Bank*, 95 NY2d 24, 29 [2000]). Deceptive acts are defined as those that are likely to mislead a reasonable consumer acting reasonably under the circumstances (*Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank, N.A.*, 85 NY2d 20, 26 [1995]).

New York's usury statute provides that loans carrying annual interest rates of more than 16 percent are prohibited, subject to limited exceptions (GOL 5-501; Banking Law § 14-a).

Contractual exemptions from liability for negligence are disfavored in New York. GOL 5-321 provides that a landlord cannot exempt itself from liability for negligence in the operation or maintenance of its property, regardless of whether the property is residential or commercial. However, where the liability is to a third party, the statute does not preclude an indemnification provision when coupled with an insurance procurement requirement in a commercial lease negotiated at arm's length between two sophisticated parties (*Great Northern Ins. Co. v Interior Constr. Corp.*, 7 NY3d 412, 419 [2006]). GOL 5-322.1 provides that an agreement related to construction, alteration, repair, or maintenance of a building that purports to exempt contractors from liability caused by their own negligence is against public policy and void. Likewise, agreements exempting building service or maintenance contractors from liability for negligence are void and unenforceable (GOL 5-323). Businesses providing garages, parking lots, or similar places for the housing, storage, parking, repair, or servicing of vehicles may not exempt themselves from liability for damages for injury to persons or property resulting from their negligence in the operation of vehicles or in the conduct or maintenance of such business (GOL 5-325). GOL 5-326 provides that the owner or operator of pools, gymnasiums, and places of amusement or recreation, for the use of which the owner or operator receives a fee or other compensation, may not exempt themselves from liability for damages caused by their negligence. Similarly, a caterer or catering establishment may not exempt itself from liability for damages caused by its negligence (GOL 5-322).

IV. Consideration: GOL 5-1103, 5-1105, 5-1107, 5-1109

GOL 5-1103 states that an agreement to modify or discharge any contractual obligation shall not be invalid for lack of consideration if expressed in a writing signed by the party against whom enforcement is sought.

GOL 5-1105 provides that a promise based on past consideration is enforceable if the promise is in a writing signed by the party to be bound, and "the consideration is expressed in the writing and is proved to have been given or performed and would be a valid consideration but for the time when it was given or performed."

Under GOL 5-1107 consideration is not required for any assignment if it is in writing and signed by the assignor.

Under GOL 5-1109 when an offer to enter into a contract is made in a writing signed by the offeror stating that the offer is irrevocable during a stated period of time, the offer is not revocable during such period because of the absence of consideration. If such a writing states that the offer is irrevocable but does not state any period or time of irrevocability, the offer is irrevocable for a reasonable time. Different rules apply to offers between merchants (*See* UCC § 2-205).

V. Statute of Frauds: GOL 5-701, 5-703; State Technology Law § 304

The statute of frauds provisions are contained in the General Obligations Law. Generally, the agreements, promises, or undertakings that are void unless in writing and signed by the party to be charged, include any agreement, promise or undertaking that is:

- By its terms, not to be performed within one year from the making thereof or the performance of which is not to be completed before the end of a lifetime;
- A special promise to answer for the debt, default, or miscarriage of another person;
- Made in consideration of marriage, except mutual promises to marry;
- A subsequent or new promise to pay a debt discharged in bankruptcy;
- A contract to pay compensation for services rendered in negotiating a loan or in negotiating the purchase, sale, exchange, renting, or leasing of any real estate or interest therein. However, a signed writing is not required if the contract is to pay compensation

to an auctioneer, an attorney at law, or a duly licensed real estate broker or real estate salesman or;
- An assignment of a life or health or accident insurance policy, or a promise to name a beneficiary of any such policy

(GOL 5-701).

An estate or interest in real property, except for a lease not exceeding one year, or any trust or power over or concerning real property cannot be created, granted, assigned, surrendered, or declared unless by act or operation of law or by a deed or conveyance in writing, signed by the person creating, granting, assigning, surrendering, or declaring the same, or by a lawful agent, authorized by writing to do so (GOL 5-703 [1]).

A contract for the leasing of any real property for more than one year, or for the sale of any real property or an interest therein, is void unless the contract or some note or memorandum thereof is in writing, signed by the party to be charged (GOL 5-703 [2]). A contract to devise real property or establish a trust of real property, or any interest in or right with reference to real property, is void unless the contract or some note or memorandum thereof is in writing and signed by the party to be charged (*Id.* at [3]). However, even without a signed writing courts may compel specific performance in cases of part performance (*Id.* at [4]).

Section 304 of the State Technology Law provides that the use of an electronic signature shall have the same validity and effect as the use of a signature affixed by hand.

VI. Third-Party Beneficiary Contracts, Including Intended vs. Incidental Beneficiaries

Under New York law, a party seeking to enforce a contract as a third-party beneficiary must establish:

- The existence of a valid contract between other parties,
- That the contract was intended for its benefit, and
- That the benefit was direct rather than incidental

(*Mendel v Henry Phipps Plaza W., Inc.*, 6 NY3d 783 [2006]).

A party is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either:

- The performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary, or
- The circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance

(*LaSalle Nat'l Bank v Ernst & Young, LLP*, 285 AD2d 101, 108 [1st Dept 2001]).

An incidental beneficiary is a beneficiary who is not an intended beneficiary (*Fourth Ocean Putnam Corp. v Interstate Wrecking Co.* 66 NY2d 38 [1985]).

A benefit will be deemed a direct benefit where the anticipated benefit is "sufficiently immediate, rather than incidental, to indicate the assumption by the contracting parties of a duty to compensate [the third party] if the benefit is lost" (*Mendel,* 6 NY3d at 786).

An intention to benefit a third party must be derived from the contract as a whole. Thus, where performance is rendered directly to a third party, it is presumed that the third party is an intended beneficiary of the contract (*Logan-Baldwin v L.S.M. Gen. Contrs. Inc*, 94 AD3d 1466 [4th Dept 2012]).

VII. Constructive Trusts

A constructive trust is an equitable remedy, and its purpose is prevention of unjust enrichment (*Sharp v Kosmalski,* 40 NY2d 119 [1976]). Unjust enrichment does not require the performance of any wrongful act by the one enriched (*Simonds v Simonds*, 45 NY2d 233, 242 [1978]). New York law generally requires four elements for a constructive trust:

- A confidential or fiduciary relationship,
- A promise, express or implied,
- A transfer of the subject res made in reliance on that promise, and
- Unjust enrichment

(*Bankers Sec. Life Ins. Socy. v Shakerdge*, 49 NY2d 939 [1980], *Sharp,* 40 NY2d at 121).

The constructive trust doctrine is not rigidly limited and the absence of any one factor will not itself defeat the imposition of a constructive trust when otherwise required by equity (*Simonds,* 45 NY2d at 241-242). "What is required, generally, is that a party hold property 'under such circumstances that in equity and good conscience he ought not to retain it'" (*Id.* at 242).

VIII. Employment Contracts

The employment-at-will doctrine provides a rebuttable presumption "that where an employment is for an indefinite term it is presumed to be a hiring at will which may be freely terminated by either party at any time for any reason or even for no reason" (*Murphy v American Home Prods. Corp.*, 58 NY2d 293, 300 [1983]). Thus, New York does not recognize a claim for wrongful discharge of an at-will employee.

The aforementioned presumption of at-will employment status may be rebutted if the totality of circumstances show that the parties intended to create an employment relationship that was not at-will (*Weiner v McGraw-Hill, Inc.,* 57 NY2d 458 [1982]). For example, in *Weiner*, the Court recognized a breach of contract claim based on the termination without cause of an indefinite-term employee, where the employer had given oral and written assurances of job security and the employee relied on those assurances (*Id.*). The Court of Appeals has also noted that in every contract there is an implied understanding that neither party will intentionally and purposely do anything to prevent the other party from carrying out the agreement, and in *Wieder v Skala*, 80 NY2d 628 [1992]) refused to dismiss a cause of action for breach of contract brought by an associate against a law firm that discharged him for reporting the ethical misconduct of another associate. The Court held that insisting that the plaintiff associate must act unethically and in violation of DR 1-103 (A), one of the primary professional rules, amounted to nothing less than a frustration of the only legitimate purpose of the employment relationship. To date, the *Wieder* exception has not been extended to a business or profession other than the practice of law.

IX. Admissibility of Extrinsic Evidence and Parol Evidence Rule

Generally, "when parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms. Evidence outside the four corners of the document as to what was really intended but unstated or misstated is generally inadmissible to add to or vary the writing" (*W.W.W. Assocs. v Giancontieri,* 77 NY2d 157, 162 [1990]). "[E]xtrinsic and parol evidence is not admissible to create an ambiguity in a written agreement which is complete and unambiguous on its face" (*Intercontinental Planning, Ltd. v Daystrom, Inc*., 24 NY2d 372, 379 [1969]). Whether a writing is ambiguous is a question of law to be resolved by the court (*Van Wagner Adver. Corp. v S & M Enters*., 67 NY2d 186, 191 [1986]).

X. Plain Language Requirement for Consumer Transactions: GOL 5-702

GOL 5-702 requires that every written agreement for the lease of space to be occupied for residential purposes (*See* Real Property, I.A.), for the lease of personal property to be used primarily for personal, family or household purposes, or to which a consumer is a party and the money, property or service which is the subject of the transaction is primarily for personal, family or household purposes, must be:

- Written in a clear and coherent manner using words with common and everyday meanings; and
- Appropriately divided and captioned by its various sections.

XI. Unsolicited Merchandise: General Business Law § 396

The receipt and use of any unsolicited goods, wares or merchandise will not cause the formation of a contract and is for all purposes deemed an unconditional gift to the recipient who may use or dispose of the same in any manner the recipient sees fit without any obligation on his part to the sender (General Business Law § 396 [2]).

XII. Home Improvement Contracts: General Business Law §§ 770, 771,773

A home improvement contract must be signed by the parties and must include certain statutorily required provisions and notices (General Business Law § 771). The failure to include such provisions and notices subjects the contractor to civil penalties (General Business Law § 773) and may render the home improvement contract unenforceable (*See Grey's Woodworks, Inc. v Witte,* 173 AD3d 1322 [3d Dept 2019]). "Home improvement" means the repairing, remodeling, altering, converting, or modernizing of, or adding to, residential property, the construction of a custom home, the installation of home improvement goods or the furnishing of home improvement services (General Business Law § 770). Included in the required notices is a notice that the owner may cancel the home improvement contract until midnight of the third business day after the day on which the owner signed an agreement (General Business Law § 771 [h]).

CRIMINAL LAW AND PROCEDURE

I. Subject Matter and Appellate Jurisdiction

A. Superior courts and local criminal courts

The Criminal Procedure Law (CPL) divides New York courts into two categories: superior courts (which include Supreme Court and County Court) and local criminal courts (which include city courts, town and village courts, district courts, and the New York City Criminal Court (CPL 10.10). Violations and misdemeanors are generally initiated and tried in local criminal courts. A felony may be initiated by the filing of an information or complaint in a local criminal court; however, in order to prosecute a defendant for a felony, there must ultimately be a grand jury indictment (unless waived by the defendant), and most proceedings following arraignment in a local criminal court on a felony complaint take place in a superior court. Any presentation in a superior court must be by grand jury indictment or, if waived by the defendant, by a superior court information filed in the superior court by the district attorney (CPL 210.05). Once a grand jury indictment or a superior court information is issued, all further proceedings take place in the superior court (CPL 170.20, 170.25). Prosecution of felonies and misdemeanors involving youths under the age of 18 are handled either in the Youth Part of superior courts or in Family Court (*See* Matrimonial and Family Law, VIII.), except that misdemeanors under the Vehicle and Traffic Law are prosecuted in the local criminal courts.

B. Classifications of offenses: Penal Law § 10.00

An "offense" is any conduct for which a sentence to a term of imprisonment or to a fine is provided by any law or by any law or ordinance of the state or a political subdivision or by any order, rule or regulation of any governmental instrumentality authorized by law to adopt it.

A "felony" is an offense for which a sentence to a term of imprisonment in excess of one year may be imposed.

A "misdemeanor" is an offense, other than a traffic violation, for which a sentence to a term of imprisonment in excess of 15 days, but not in excess of one year, may be imposed.

A "crime" is a misdemeanor or a felony. Although many crimes are defined by the Penal Law, violations of a myriad of other statutes may constitute crimes (*e.g.,* Vehicle and Traffic Law art. 31 [alcohol and drug-related offenses], General Business Law [fraudulent investment practices], Election Law [illegal voting and campaign practices], and Agricultural and Markets Law art. 26 [animal cruelty].

A "violation" is an offense, other than a traffic infraction, for which a sentence to a term of imprisonment in excess of 15 days cannot be imposed.

A "traffic violation" is a violation of any provision of the Vehicle and Traffic Law or of any other law, ordinance, order, rule or regulation regulating traffic which is not expressly declared to be a misdemeanor or a felony (Vehicle and Traffic Law § 155).

C. Trials: CPL 270, 310, 360

Unless waived by the defendant (CPL 320.10), trial of a felony or misdemeanor charge is by jury (CPL 260.10, 340.40 [2]). The trial of a noncriminal offense must be by a single judge without a jury (CPL 340.40 [1]).

The jury for a trial of a felony consists of 12 persons (CPL 270.05 [1]), and up to 6 alternate jurors may also be selected (CPL 270.30). The jury for a trial of a misdemeanor consists of 6 persons (CPL 360.10 [1]), and 1 or 2 alternate jurors may be selected (CPL 360.35). A jury verdict must be unanimous (CPL 310.40, 310.80).

D. Appeals: CPL 450.60

Appeals in criminal cases may be taken from most judgments, sentences and orders (CPL art 450). Unless the defendant waived the right to appeal as part of the plea bargain, a defendant who has been convicted and sentenced pursuant to a plea bargain may thereafter appeal pretrial orders denying motions for the suppression of confessions, illegally obtained evidence or identification testimony, but a defendant may not appeal from a sentence which did not exceed that which was agreed to by the defendant as a condition of the plea (CPL 450.10 [1], [2]).

An appeal from a judgment, sentence or order of the supreme court or of a county court must be taken to the appellate division of the department in which it was entered (CPL 450.60 [1], [2]).

Appellate Terms of the Supreme Court in the First and Second Departments hear appeals from cases originating in the local criminal courts in their departments (CPL 450.60 [3], [4]; 450.60; 22 NYCRR 640.1, 730.1).

An appeal from a judgment, sentence or order of a local criminal court located in the Third or Fourth Department must be taken to the county court of the county in which such judgment, sentence or order was entered (CPL 450.60 [3]).

An appeal to the Court of Appeals is generally available only by permission, and the appellant must obtain a certificate granting leave to appeal and certifying that there is a question of law which ought to be reviewed by the Court (CPL 450.90, 460.10 [5] [a]). Without the required certificate, the Court lacks jurisdiction, and any appeal taken will be dismissed (*People v Thomas*, 44 NY2d 759 [1978]). Either a judge of the Court of Appeals or a justice of the Appellate Division may grant a certificate permitting an appeal to the Court of Appeals from an order of the Appellate Division, but only a judge of the Court of Appeals may grant leave to appeal from an order of an intermediate appellate court other than the Appellate Division (CPL 460.20 [2]). Denial of the application for permission to appeal by the judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice (*People v Delvas*, 233 AD2d 241 [1st Dept 1996]).

II. Criminal Liability and Mental Culpability

A. Criminal Liability: Penal Law § 15.05

The minimal requirement for criminal liability is the performance by a person of conduct which includes a voluntary act or the failure to perform an act which the person is physically capable of performing. If such conduct is all that is required for the commission of an offense, or if an offense or some material element thereof does not require a culpable mental state on the part of the actor, such offense is one of "strict liability." If a culpable mental state on the part of the actor is required with respect to every material element of an offense, such offense is one of "mental culpability."

B. Culpable mental states: Penal Law § 15.05

The culpable mental states are intentionally, knowingly, recklessly or with criminal negligence.

A person acts "intentionally" with respect to a result or conduct when his or her conscious objective is to cause such result or engage in such conduct.

"Knowingly" requires that a person be "aware" that his or her conduct is of the nature described by the offense or that a circumstance described by the offense exists.

A person acts "recklessly" with respect to a result or to a circumstance when the person is aware of and consciously disregards a substantial and unjustifiable risk that such result will occur or that such circumstance exists.

"Criminal negligence" requires that a person fail to perceive a substantial and unjustifiable risk that a certain result will occur or a certain circumstance exists.

For a person to act recklessly or with criminal negligence, the risk must be of such nature and degree that the disregard of it or the failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation.

C. Mistake of fact or law: Penal Law § 15.20

A person is generally not relieved of criminal liability for conduct because the person engages in such conduct under a mistaken belief of fact unless the factual mistake:

- negates the culpable mental state required for the commission of the offense,
- expressly constitutes a defense under the statute defining the offense, or
  is of a kind that supports a defense of justification (*See* Criminal Law and Procedure, IV.H.)

(Penal Law § 15.20 [1]).

Additionally, a person is generally not relieved of criminal liability for conduct because the person engages in the conduct under the mistaken belief that it does not constitute an offense, unless the mistaken belief is based upon an official statement of the law (Penal Law § 15.20 [2]).

If an element of an offense is the age of a child, knowledge by the defendant of the age of the child is not an element of the offense even if the term "knowingly" is used in defining the offense, and it is not, unless expressly so provided, a defense to a prosecution that the defendant did not know the age of the child or believed such age to be the same as or greater than that specified in the statute (Penal Law § 15.20 [3]).

D. Accessorial conduct (Accomplice): Penal Law art 20

When one person engages in conduct which constitutes an offense, another person is criminally liable for that conduct when, acting with the mental culpability required for the commission of the offense, the person solicits, requests, commands, importunes, or intentionally aids that other person to engage in that conduct (Penal Law § 20.00). In any prosecution of a defendant based upon his or her accessorial conduct, it is no defense that:

- The other person is not guilty of the offense in question owing to a lack criminal responsibility or other legal incapacity or exemption, or any other factor precluding the mental state required for the commission of the offense in question; or
- The other person has not been prosecuted for or convicted of any offense based upon the conduct in question, or has previously been acquitted thereof, or has legal immunity from prosecution therefor; or
- The offense in question can be committed only by a particular class or classes of persons (e.g., bribe receiving by a public official), and the defendant, not belonging to such class or classes, is for that reason legally incapable of committing the offense in an individual capacity

(Penal Law § 20.05; *see* Criminal Law and Procedure, IV.I. and Evidence, III.A. regarding the need for corroboration of the testimony of an accomplice).

III. Crimes

A. Anticipatory offenses

1. Criminal solicitation: Penal Law art 100

In general, a person is guilty of some degree of criminal solicitation when, with intent that another engages in criminal conduct, the person solicits, requests, commands, importunes, or otherwise attempts to cause such other person to engage in such conduct. Factors in determining the degree of the crime of criminal solicitation include the seriousness of the crime solicited and the relative ages of the solicitor and the person solicited. The crime is completed by the communication to another to commit a crime; no resulting action by the person being solicited is necessary (*People v Lubow*, 29 NY2d 59 [1971]). If the person solicited attempts to commit the crime but fails, the solicitor still will be liable for attempt (*See* Criminal Law and Procedure, III.A.3.). And if the person solicited actually commits the crime, the solicitor will be liable for the solicited crime as an accessory (*See* Criminal Law and Procedure, II.D.).

2. Conspiracy: Penal Law art 105

In general, a person is guilty of some degree of conspiracy when, with intent that conduct constituting a crime be performed, the person agrees with one or more persons to engage in or cause the performance of such conduct. It is essential for a conviction for conspiracy that there be proof of an overt act committed by one of the conspirators in furtherance of the conspiracy (Penal Law § 105.20). Factors in determining the degree of the crime of conspiracy include the seriousness of the crime to be performed and the relative ages of conspirators. New York has adopted the unilateral theory of conspiracy such that a defendant may be convicted of conspiracy even though the illicit agreement is with a party who lacks criminal culpability (e.g., infancy or mental disease or defect) or lacks culpability (e.g., an undercover police officer) (Penal Law § 105.30).

3. Attempt to commit a crime: Penal Law art 110

A person is guilty of an attempt to commit a crime when, with the intent to commit a crime, the person engages in conduct which tends to effect the commission of such crime (Penal Law § 110.00). New York, unlike the Model Penal Code, requires “intent” to commit the particular crime. If intent is not a requisite element of a crime, a defendant cannot be convicted of an attempt to commit that crime. For example, a person upon a trial cannot be convicted of an attempt to commit depraved indifference murder (Penal Law § 125.25 [2]; *People v Acevedo*, 32 NY2d 807 [1973]), manslaughter (*People v Martinez*, 81 NY2d 810 [1993]), felony murder (*People v Hendrix*, 56 AD2d 580 [2d Dept 1977]), or reckless/criminally negligent assault while resisting arrest causing unintentional injury (Penal Law § 120.05 [3]; *People v Campbell*, 72 NY2d 602 [1988]). However, a conviction of a crime such as attempted manslaughter will be upheld when “it was sought by defendant and freely taken as part of a bargain which was struck for the defendant's benefit” (*People v Foster*, 19 NY2d 150, 154 [1967]).

4. Criminal facilitation: Penal Law art 115

Criminal facilitation occurs when a person, believing it probable that the person is rendering aid to another person who intends to commit a crime, engages in conduct that provides the other person the means or opportunity for the commission of a crime and that in fact aids such person in the commission of the crime (Penal Law § 115.01). While knowingly aiding the commission of a crime, the facilitator does not necessarily possess the mental culpability required for commission of the crime and is therefore not within the statutory definition of an accomplice (*See* Criminal Law and Procedure, II.D.). A person cannot be convicted of criminal facilitation upon the testimony of a person who has committed the felony charged to have been facilitated unless the testimony is corroborated by other evidence that connects the defendant with the facilitation (Penal Law § 115.15).

B. Assault and related offenses: Penal Law art 120

The traditional elements of assault are the specific intent to cause physical injury and the causing of such injury. The degrees of assault depend on such factors as whether physical or serious physical injury was caused, whether a deadly weapon or dangerous instrument was used, the status of the victim (e.g., police, other public servants, medical care providers, children, senior citizens, process servers), and the actor's mental culpability. Assault crimes can involve intentional, reckless and criminally negligent culpable mental states (*See* Criminal Law and Procedure, II.B.).

The Penal Law includes some specific assault crimes, such as vehicular assault (Penal Law §§ 120.03, 120.04, 120.04-a) and gang assault (Penal Law §§ 120.06, 120.07), and some related crimes, including menacing (Penal Law §§ 120.13, 120.14, 120.15, 120.18), hazing (Penal Law §§ 120.16, 120.17), reckless endangerment (Penal Law §§ 120.20, 120.25), promoting suicide (Penal Law §§ 120.30, 120.35), stalking (Penal Law §§ 120.45, 120.50, 120.55, 120.60), and strangulation (Penal Law art 121).

C. Murder, manslaughter and criminally negligent homicide: Penal Law art 125

Homicide is conduct which causes the death of a person under circumstances constituting murder, manslaughter or criminally negligent homicide (Penal Law § 125.00). The various degrees of homicide depend on how the death was caused, who the victim was, and the mental state of the actor. In order to be criminally responsible for homicide, the defendant's actions must be a sufficiently direct cause of the ensuing death (*People v DaCosta*, 6 NY3d 181, 184 [2006]). An act is a sufficiently direct cause when the ultimate harm should have been reasonably foreseen (*Id.)*. In *DaCosta* the defendant's attempt to elude a pursuing police officer by running across a busy highway was held to be a direct cause of the officer's death resulting from his being struck by a vehicle.

The basic definitions of intentional murder in the first degree and in the second degree are the same, i.e., "with intent to cause the death of another person, he causes the death of such person, or of a third person" (Penal Law §§ 125.25 [1], 125.27 [1]).[6] In addition to requiring an intentional killing, a charge of first-degree murder requires that the defendant be at least 18 years of age (Penal Law § 125.27 [1] [b]; *People v Gatti*, 277 AD2d 1041 [4th Dept 2000]) and that the defendant's conduct include one of the numerous separate aggravating factors listed in the statute, many of which involve the status of the victim (e.g., police officers, peace officers and employees of correctional facilities, various persons who as part of their official duties respond to emergencies, witnesses to crimes and their immediate family members, judges and officers of the court)(Penal Law § 125.27 [1] [a]). Other aggravating factors include that the intentional killing was a murder for hire, that it was committed during the course of another specified crime, and that there were multiple victims (*id.*).

The rule of transferred intent is incorporated in each of the intentional homicide crimes.

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[6] The Model Penal Code § 210.2 (1) (a) differs from New York law in that, under the Code, a person is guilty of murder if the person has killed another person "purposely or knowingly," or "recklessly under circumstances manifesting extreme indifference to the value of human life."

Under that rule, "where the resulting death is of a third person who was not the defendant's intended victim, the defendant may nonetheless be held to the same level of criminal liability as if the intended victim were killed" (*People v Dubarry*, 25 NY3d 161, 171 [2015]), quoting *People v Fernandez,* 88 NY2d 777, 781 [1996]).

In addition to an intentional murder without one of the aggravating factors required for murder in the first degree, murder in the second degree includes depraved indifference murder, which occurs when "under circumstances evincing a depraved indifference to human life, [one] recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes the death of another person" (Penal Law § 125.25 [2]). Depraved indifference has been judicially defined as a culpable mental state (*See People v Feingold*, 7 NY3d 288 [2006] *overruling People v Register*, 60 NY2d 270 [1983]; *compare* Model Penal Code § 210.2 [1] [b]).

Felony murder, also second-degree murder, occurs if during or in immediate flight from the commission or attempted commission of a statutorily specified felony (e.g., robbery, burglary, kidnaping, arson, rape, escape), the sole participant or one of several participants in the crime causes the death of a person other than a participant (Penal Law § 125.25 [3]). Each participant in the crime, irrespective of whether the participant caused the death, may be guilty of felony murder under such circumstances. It is an affirmative defense that the defendant:

- Did not commit the homicidal act or in any way solicit, request, command, importune, cause or aid the commission thereof; and
- Was not armed with a deadly weapon, or any instrument, article or substance readily capable of causing death or serious physical injury and of a sort not ordinarily carried in public places by law-abiding persons; and
- Had no reasonable ground to believe that any other participant was armed with such a weapon, instrument, article or substance; and
- Had no reasonable ground to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury.

Manslaughter in the first degree occurs when with the intent to cause serious physical injury to another person, the defendant causes the death of such person or of a third person; or with the intent to cause the death of another person, he causes the death of such person or of a third person under the influence of extreme emotional disturbance (Penal Law § 125.20 [1], [2]; *see* Criminal Law and Procedure, II.B., IV.D.*)*.

A person is guilty of manslaughter in the second degree when the person recklessly causes the death of another or intentionally causes or aids another person to commit suicide (Penal Law § 125.15; *see* Criminal Law and Procedure, II.B., III.C.).

A person is guilty of criminally negligent homicide when, with criminal negligence, the person causes the death of another (Penal Law §125.10; *see* Criminal Law and Procedure, II.B.).

If the victim of manslaughter or of criminally negligent homicide is a police officer or peace officer, the crime charged may be aggravated manslaughter in the first or second degree or aggravated criminal negligent homicide, which are higher classes of felonies (Penal Law §§ 125.21, 125.22, 125.11).

A person is guilty of vehicular manslaughter in the second degree when the person causes the death of another person as the result of operating a motor vehicle, vessel, public vessel, snowmobile or all-terrain vehicle while unlawfully intoxicated or impaired by the use of alcohol or a drug (Penal Law § 125.12). The crime charged may be elevated to vehicular manslaughter in the first degree by one of the several aggravating factors listed in the statute, including a blood alcohol content of .18 of one per centum or more by weight, his or her license or privilege to operate a vehicle being currently suspended or revoked in this or another state, having previously been convicted of driving while intoxicated within the preceding ten years in this or any other state, or causing the death of more than one person (Penal Law § 125.13). If in addition to one of the aggravating factors, the defendant was engaged in reckless driving, the charge may be elevated to aggravated vehicular homicide (Penal Law § 125.14).

D. Kidnapping and related crimes: Penal Law art. 135

1. Unlawful imprisonment

Unlawful imprisonment is the restraint another person (Penal Law § 135.05). “Restrain” means to restrict a person’s movements intentionally and unlawfully in a manner so as to interfere substantially with the person’s liberty by moving the person from one place to another, or by confining the person either where the restriction began or in a place to which the person has been moved, without consent and with knowledge that the restriction is unlawful (Penal Law § 135.00 [1]). The degree of the crime is elevated if the restraint is under circumstances which expose the victim to a risk of serious physical injury (Penal Law § 135.10).

2. Kidnapping

Kidnapping in the abduction of another person (Penal Law § 135.20). “Abduct” means to restrain a person with intent to prevent his liberation by either (a) secreting or holding him or her in a place where the person is not likely to be found, or (b) using or threatening to use deadly physical force (Penal Law § 135.00 [2]). The degree of the crime may be elevated based on the purpose for the abduction, the duration of the abduction and the death of the victim (Penal Law § 135.25). If the victim was less than 16 years old or an incompetent person when abducted, death is presumed, from evidence that the victim’s parents, guardians or other lawful custodians did not see or hear from the victim following the abduction and prior to trial and received no reliable information persuasively indicating that the victim was alive. In all other cases, death is presumed from evidence that a person with whom the victim would have been extremely likely to visit or communicate were the victim alive and free to do so did not see or hear from the victim and received no reliable information persuasively indicating that the victim was alive (*Id.* at [3]).

3. Defense

For both unlawful imprisonment and kidnapping it is an affirmative defense that (a) the person restrained was a child less than 16 years old, and (b) the defendant was a relative of the child, and (c) his sole purpose was to assume control of such child (Penal Law §§ 135.15, 135.30).

4. Custodial Interference

A person commits custodial interference when, knowing the person has no legal right to do so, the person takes or entices:

- A child less than 16 years old who is related to the person, from the child's lawful custodian, intending to hold the child permanently or for a protracted period, or
- Any incompetent person or other person entrusted by authority of law to the custody of another person or institution from lawful custody

(Penal Law § 135.45).

The degree of the crime of custodial interference is elevated when it is committed:

- By removing the victim from this state with the intent to permanently remove the victim from the state, or
- Under circumstances which expose the victim to a risk that the victim's safety will be endangered or the victim's health will be materially impaired

(Penal Law § 135.50).

It is an affirmative defense to a prosecution of an elevated degree of custodial interference based on the victim being removed from the state that the victim had been abandoned or that the taking was necessary in an emergency to protect the victim because the victim has been subjected to or threatened with mistreatment or abuse (*Id.*).

E. Sex offenses: Penal Law art 130

It is an element of every offense defined by Article 130 that the sexual act was committed without the victim's consent (Penal Law § 130.05 [1]). Pursuant to Penal Law § 130.05 [2], lack of consent results from forcible compulsion or the incapacity of the victim to consent. In addition, if the offense charged is sexual abuse or forcible touching, lack of consent results from any circumstances in which the victim does not expressly or impliedly acquiesce in the actor's conduct. And if the offense charged is rape in the third degree (Penal Law § 130.25]3]) or criminal sexual act in the third degree (Penal Law § 130.40 [3]), lack of consent results from any circumstances under which, at the time of offense, the victim clearly expressed that the victim did not consent to engage in such act, and a reasonable person in the actor's situation would have understood such person's words and acts as an expression of lack of consent to such act under all the circumstances.

Pursuant to Penal Law § 130.05 (3), a person is deemed incapable of consent when the person is:

- Less than 17 years old,
- Mentally disabled or incapacitated, or physically helpless,

- An inmate, patient or resident of a correctional facility, a residential care facility operated by the office of children and family services, or a facility for the treatment of people with mental illnesses, developmental disabilities or substance abuse problems, and the actor is an employee ("employee" is specifically defined for the various types of facilities),
- A client or patient of a health care provider or mental health care provider charged with one of certain specified crimes, and the act of sexual conduct occurs during a treatment session, consultation, interview, or examination, or
- In the custody of a law enforcement official and the actor is a law enforcement official who either: (i) is maintaining custody of the person; or (ii) knows, or reasonably should know, that at the time of the offense, the person is in custody.

Factors defining and determining the degree of many sex crimes, such as rape, criminal sexual act and sexual abuse, include the relative ages of the perpetrator and the victim, the reason for lack of consent, the extent of the sexual contact and the use of physical force.

Although many sex offenses include the age of a child as an element of the offense, most sex crimes do not require the mental state of "knowingly." Consequently, it is not a defense that the defendant did not know the age of the child or believed such age to be the same as or greater than that specified in the statute. However, if the victim's lack of consent is based solely upon his or her incapacity to consent because the victim was mentally disabled, mentally incapacitated or physically helpless, it is an affirmative defense that the defendant did not know of the facts or conditions responsible for such incapacity to consent (Penal Law § 130.10 [1]). And if the lack of consent is based solely on the victim's mental defect or mental incapacity, a conviction may not be based solely on the testimony of the victim, unsupported by other evidence tending to:

- Establish that an attempt was made to engage the victim in the accused sexual contact at the time of the occurrence; and
- Connect the defendant with the commission of the offense

(Penal Law § 130.16).

F. Burglary and related offenses: Penal Law art 140

A person is guilty of trespass, a violation, when the person knowingly enters or remains unlawfully in or upon premises (Penal Law § 140.05). "Premises" includes any real property and any "building," which is defined to include, in addition to its normal meaning, any structure, vehicle or watercraft used for overnight lodging of persons, used by persons for carrying on business therein, or used as an elementary or secondary school (Penal Law § 140.00 [1], [2]). Factors determining the degree of the crime of criminal trespass include whether the premises was a building and if so, the nature of the building, and whether a participant possessed a deadly weapon or instrument (Penal Law §§ 140.10, 140.15, 140.17).

Burglary occurs when a person knowingly enters or remains unlawfully in a building with an intent to commit a crime therein whether or not the crime actually is committed (Penal Law § 140.20). Factors determining the degree of the crime of burglary include whether the building was a dwelling and whether a participant possessed or used a deadly weapon or instrument or caused physical injury to a non-participant (Penal Law §§ 140.25, 140.30).

G. Arson: Penal Law art 150

A person is guilty of arson in the fifth degree when the person damages property of another without consent of the owner by intentionally starting a fire or causing an explosion (Penal Law § 150.01).

A person is guilty of arson in the fourth degree when he recklessly damages a building or motor vehicle by intentionally starting a fire or causing an explosion. It is an affirmative defense that no person other than the defendant had a possessory or proprietary interest in the building or motor vehicle (Penal Law § 150.05).

A person is guilty of arson in the third degree when he intentionally damages a building or motor vehicle by starting a fire or causing an explosion. It is an affirmative defense that (a) no person other than the defendant had a possessory or proprietary interest in the building or motor vehicle, or if other persons had such interests, all of them consented to the defendant's conduct, and (b) the defendant's sole intent was to destroy or damage the building or motor vehicle for a lawful and proper purpose, and (c) the defendant had no reasonable ground to believe that his conduct might endanger the life or safety of another person or damage another building or motor vehicle (Penal Law § 150.10).

A person is guilty of arson in the second degree when he intentionally damages a building or motor vehicle by starting a fire, and (a) another person who is not a participant in the crime is present in such building or motor vehicle at the time, and (b) the defendant knows that fact or the circumstances are such as to render the presence of such a person therein a reasonable possibility.

A person is guilty of arson in the first degree when he intentionally damages a building or motor vehicle by causing an explosion or a fire and when (a) such explosion or fire is caused by an incendiary device propelled, thrown or placed inside or near such building or motor vehicle; or when such explosion or fire is caused by an explosive; or when such explosion or fire either (i) causes serious physical injury to another person other than a participant, or (ii) the explosion or fire was caused with the expectation or receipt of financial advantage or pecuniary profit by the actor; and when (b) another person who is not a participant in the crime is present in such building or motor vehicle at the time; and (c) the defendant knows that fact or the circumstances are such as to render the presence of such person therein a reasonable possibility (Penal Law §§ 150.15, 150.20).

H. Larceny: Penal Law art 155

Penal Law § 155.05 (1) contains the general definition of larceny for all degrees of the crime: a person commits larceny when, with intent to deprive another of property or to appropriate the same to himself, herself or to a third person, he or she wrongfully takes, obtains or withholds property from its owner. Penal Law § 155.05 (2) includes the four common law larceny offenses (larceny by trespassory taking, larceny by trick, embezzlement, and obtaining property by false pretenses). It also includes larceny committed by:

- Acquiring lost property,
- Committing the crime of issuing a bad check (Penal Law § 190.05),
- False promise,
- Extortion, and
- Wage theft.

The concept of larceny by false promise is intended to cover situations which are not covered by larceny by false pretenses and larceny by trick, both of which require the intentional misrepresentation of a past or present fact. Larceny by false promise is committed when a person obtains property of another, pursuant to a scheme to defraud, by means of a representation, express or implied, that he, she or a third person will in the future engage in particular conduct, with no intention that the conduct will occur.

A higher burden of proof is required for larceny by false promise. The defendant's intention or belief that the promise would not be performed may not be established by or inferred from the fact alone that the promise was not performed and must be based upon evidence establishing that the facts and circumstances are wholly consistent with guilty intent or belief and wholly inconsistent with innocent intent or belief, and excluding to a moral certainty every hypothesis except that of the defendant's intention or belief that the promise would not be performed.

Factors determining the degree of the crime of larceny include the value of the stolen property, the nature of the property (e.g., a credit card, a firearm, a motor vehicle, a religious icon, or an ATM machine) and the use of extortion (Penal Law §§ 155.30, 155.35, 155.40, 155.42, 155.43).

I. Robbery: Penal Law art 160

The statutory definition of robbery is a forcible stealing. A robbery occurs when in the course of committing a larceny, a person "uses or threatens the immediate use of physical force upon another person" (Penal Law §§ 160.00, 16.05). The use or threat of force must be "for the purpose" of preventing or overcoming resistance to the taking of the property or "for the purpose" of compelling another to deliver up the property. In *People v Smith* (79 NY2d 309 [1992]), the Court of Appeals decided that the "for the purpose" language required that the defendant intend one of the alternatives, rather than that the force used have one of the alternative effects.

Factors in determining the degree of the crime of robbery include being aided by another person physically present, causing physical injury to a non-participant, being armed with a deadly weapon, using or threatening the use of a dangerous instrument and displaying what is or appears to be a firearm (Penal Law §§ 160.10, 160.15).

J. Drug offenses

1. Controlled substances offenses: Penal Law art 220

In general, a person is guilty of some degree of criminal possession or sale of a controlled substance when the person knowingly and unlawfully possesses or sells ("sell" is defined as "to sell, give, or dispose of to another" (Penal Law § 220.00 [1]) a specified controlled substance defined in Public Health Law Article 33 (Penal Law § 220.00 [5]). Factors in determining the degrees of criminal possession or sale include the type and weight of the drug involved. The degree of criminal possession may also be affected by an intent to sell, and the degree of criminal sale may also be affected by the sale taking place on the grounds of a school or child day care facility or by the age of the purchaser.

2. Cannabis Use and Sale

The sale and use of cannabis is no longer illegal in New York but is subject to regulation and taxation pursuant to the "Cannabis Law" adopted in 2021 (*see* NY Cannabis Law § 1, et seq.). New York also permits the medical use of marijuana and regulates its use (*See* Public Health Law § 3360, et seq.).

3. Interpretive provisions: Penal Law §§ 15.20, 220.25

If the aggregate weight of a controlled substance or marihuana is an element of an offense, knowledge by the defendant of the aggregate weight of the controlled substance or marihuana is not an element of any the offense, even if the term "knowingly" is used in defining the offense for its other elements such as the type of drug, and it is not, unless expressly so provided, a defense to a prosecution that the defendant did not know the aggregate weight of the controlled substance or marihuana (Penal Law § 15.20 [4]).

The presence of a controlled substance in an automobile, other than a public omnibus, is presumptive evidence of knowing possession thereof by each and every person in the automobile at the time such controlled substance was found. This presumption does not apply (a) to a duly licensed operator of an automobile operating it for hire in the lawful and proper pursuit of his trade, or (b) to any person in the automobile if one of them, having obtained the controlled substance and not being under duress, is authorized to possess it and such controlled substance is in the same container as when he received possession thereof, or (c) when the controlled substance is concealed upon the person of one of the occupants (Penal Law § 220.25 [1]).

The presence of a narcotic drug, narcotic preparation, marihuana or phencyclidine in open view in a room, other than a public place, under circumstances evincing an intent to unlawfully mix, compound, package or otherwise prepare for sale such controlled substance is presumptive evidence of knowing possession thereof by each and every person in close proximity to such controlled substance at the time such controlled substance was found. This presumption does not apply to any such persons if (a) one of them, having obtained such controlled substance and not being under duress, is authorized to possess it and such controlled substance is in the same container as when the person received possession thereof, or (b) one of them has such controlled substance upon his or her person (Penal Law § 220.25 [2]).

IV. Affirmative and Ordinary Defenses

A. Burden of proof: Penal Law § 25.00

There is a fundamental distinction between an ordinary defense and an affirmative defense. The prosecution has the burden of disproving an ordinary defense beyond a reasonable doubt; all that is required for the defendant to establish the defense is evidence, which if credited, is sufficient to raise a reasonable doubt. When an affirmative defense is raised at trial, the defendant has the more demanding burden of establishing such a defense by a preponderance of the evidence (*People v Butts*, 72 NY2d 746 [1988]).

B. Infancy: Penal Law § 30.00

A person less than 18 years old is not criminally liable for conduct except as noted below (Penal Law § 30.00 [1]).

A person 16 or 17 years of age is criminally responsible for acts constituting:

- A felony,
- A traffic infraction,
- A violation, or
- A misdemeanor, but only if:
    - the misdemeanor charge is a violation of the Vehicle and Traffic Law, or
    - the misdemeanor charge is accompanied by a felony charge arising from the same criminal transaction, or
    - the misdemeanor charge is part of a plea bargain for a felony offense and the plea has not been deemed replaced by a fact-finding order with the proceeding removed to family court.

(Penal Law § 30.00 [3]); Criminal Procedure Law § 220.10 [5] [g-1].

A person 13 years of age is criminally responsible for certain enumerated acts constituting murder in the second degree (Penal Law §§ 30.00 [2], 125.25 [1], [2], [3]).

A person 14 or 15 years of age is criminally responsible for those same acts constituting murder in the second degree and also for acts constituting other enumerated serious, violent felonies (Penal Law § 30.00 [2]).

Infancy is an ordinary defense (Penal Law §30.00 [4]).

C. Mental disease or defect: Penal Law § 40.15

In any prosecution for an offense, it is an affirmative defense that when the defendant engaged in the proscribed conduct, the defendant lacked criminal responsibility by reason of mental disease or defect. Such lack of criminal responsibility means that at the time of such conduct, as a result of mental disease or defect, the defendant lacked "substantial capacity to know or appreciate" either:

- The nature and consequences of such conduct, or
- That such conduct was wrong.

Lacking a substantial capacity to "know or appreciate" is "designed to permit the defendant possessed of mere surface knowledge or cognition to be excused, and to require that he have some understanding of the legal and moral import of the conduct involved if he is to be held criminally responsible" (*People v Adams*, 26 NY2d 129, 135 [1970]).

D. Specific defenses to murder: Penal Law §§ 125.25 (1), 125.27 (2)

It is an affirmative defense to intentional murder in the first and second degree that the defendant acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse. The defense reduces the degree of criminal culpability for acts that would otherwise constitute murder; it is not a defense to the crime of manslaughter or any other crime. The defense, if successful, does not result in an acquittal but reduces the charge to manslaughter in the first degree.

The defense must be supported by proof that the defendant "'suffered from a mental infirmity not rising to the level of insanity at the time of the homicide, typically manifested by a loss of self-control'" (*People v Diaz*, 15 NY3d 40, 45 [2010] [internal citations omitted]). It requires evidence "of a subjective element, that defendant acted under an extreme emotional disturbance, and an objective element, that there was a reasonable explanation or excuse for the emotional disturbance" (*Id.*). It is not a "reasonable explanation or excuse" that the defendant's conduct resulted from the discovery, knowledge or disclosure of the victim's sexual orientation, sex, gender, gender identity, gender expression or sex assigned at birth.

It is also an affirmative defense to intentional murder in the first and second degree that the defendant's conduct consisted of causing or aiding, without the use of duress or deception, another person to commit suicide. The defense reduces the degree of criminal culpability for acts that would otherwise constitute murder; it is not a defense to the crime of manslaughter in the second degree or any other crime. The defense, if successful, does not result in an acquittal but reduces the charge to manslaughter in the second degree.

E. Intoxication: Penal Law § 15.05, 15.25

Intoxication is not a full defense to a criminal charge, but in any prosecution for an offense, evidence of intoxication of the defendant may be offered by the defendant whenever it is relevant to negate an element of the crime charged. Voluntary intoxication may not negate a "reckless" culpable mental state (Penal Law § 15.05 [3]).

F. Alibi

An alibi is not an affirmative or exculpatory defense which the defendant has the burden of proving (*People v Victor*, 62 NY2d 374, 377-378 [1984]). Rather, it is simply evidence that will require an acquittal if, when all the evidence is considered, a reasonable doubt is raised as to defendant's guilt (*Id.*). In order to avoid confusion and ensure that the jury understands that the prosecution must always meet their burden of proving that the accused actually committed the crime, an alibi is treated for practical purposes the same as a statutory defense even though it is not so defined in the Penal Law (*Id.*). Thus, the prosecution has the burden of disproving an alibi beyond a reasonable doubt (*Id.*).

G. Entrapment: Penal Law § 40.05

In any prosecution for an offense, it is an affirmative defense that the defendant engaged in the proscribed conduct because the defendant was induced or encouraged to do so by a public servant, directly or through an agent, seeking to obtain evidence against the defendant for the purpose of criminal prosecution, using methods that created a substantial risk that the offense would be committed even though the defendant was not otherwise disposed to commit it. Inducement or encouragement requires active inducement or encouragement; conduct merely affording a person an opportunity to commit an offense does not constitute entrapment.

Although an entrapment defense may fail because of a defendant's predisposition to commit the offense, if the government's conduct was "so egregious and deprivative" as to constitute a violation of the due process clause of the New York State Constitution, the defendant may still be entitled to dismissal of the charges (*People v Isaacson*, 44 NY2d 511 [1978]).

H. Justification; defense of self or another: Penal Law art 35

In any prosecution for an offense, justification is a defense (Penal Law § 35.00). Conduct that would otherwise constitute an offense is justifiable when the conduct is authorized by law or is necessary as an emergency measure to avoid imminent injury (Penal Law § 35.05).

Penal Law § 35.10 authorizes the appropriate use of force by various individuals, including parents, teachers, correction officers and medical care providers and also to prevent a suicide.

An actor may use physical force against another person if the actor reasonably believes it necessary to defend the actor or a third person from what the actor reasonably believes to be the use or imminent use of unlawful physical force by such other person. However, the actor's use of physical force is not justified if the actor provoked the other person's conduct with intent to cause him or her physical injury unless the actor effectively withdrew from the encounter but the other person persisted in continuing the incident by the use or threatened imminent use of unlawful physical force (Penal Law § 35.15 [1]).

An actor may also use upon another person any degree of physical force, other than deadly physical force, which the actor reasonably believes to be necessary to prevent or terminate what the actor reasonably believes to be the commission or attempted commission by the other person of larceny, of a crime involving damage to premises, or of criminal mischief with respect to property other than premises (*See* Criminal Law and Procedure, III.F. for the definition of "premises"). And an actor in possession or control of any premises, or an actor licensed or privileged to be on or in the premises, may use upon another person any degree of physical force, other than deadly physical force, which the actor reasonably believes to be necessary to prevent or terminate what the actor reasonably believes to be the commission or attempted commission by the other person of a criminal trespass upon such premises (Penal Law §§ 35.20 [1], [2], 35.25).

An actor may not use deadly physical force to defend the actor or a third party unless he reasonably believes the other person is using or about to use deadly physical force and he cannot retreat with complete safety. There is no duty to retreat if the actor is in his own home and was not the initial aggressor or if the actor is a police officer or peace officer or a person assisting a police officer or a peace officer at the latter's direction (Penal Law § 35.15 [2] [a]).

Deadly physical force may also be justified if the actor reasonably believes that the other person is committing or attempting to commit a kidnapping, forcible rape, forcible criminal sexual act, robbery; arson, or burglary of a dwelling or occupied building, and in the case of such a burglary the justified actor must be a person in possession or control of, or licensed or privileged to be in, the dwelling or occupied building (Penal Law §§ 35.15 [2] [b], [c], 35.20 [1], [3]).

In determining whether a defendant acted reasonably in perceiving and defending against impending harm, New York permits the defendant to introduce evidence of the victim's prior acts of violence only if such were known to the defendant at the time of the incident (*Matter of Robert S.*, 52 NY2d 1046 [1981]; *People v Miller*, 39 NY2d 543 [1976]).

I. Renunciation: Penal Law § 40.10

In any prosecution for an offense, other than an attempt to commit a crime, in which the defendant's guilt depends upon his or her criminal liability for the conduct of another (accessorial conduct, *see* Criminal Law and Procedure, II.D.), it is an affirmative defense that the defendant withdrew from participation in such offense prior to the commission of the offense and made a substantial effort to prevent the commission of the crime (Penal Law § 40.10 [1]).

In any prosecution for criminal facilitation (*See* Criminal Law and Procedure, III.A.4.), it is an affirmative defense that, prior to the commission of the felony which the defendant facilitated, the defendant made a substantial effort to prevent the commission of that felony (Penal Law § 40.10 [2]).

In any prosecution for an attempt to commit a crime (*See* Criminal Law and Procedure, III.A.3.), it is an affirmative defense that, under circumstances manifesting a voluntary and complete renunciation of his or her criminal purpose, the defendant avoided the commission of the crime attempted by abandoning his criminal effort and, if mere abandonment was insufficient to accomplish such avoidance, by taking further and affirmative steps which prevented the commission thereof (Penal Law § 40.10 [3]).

In any prosecution for criminal solicitation (*See* Criminal Law and Procedure, III.A.1.) or for conspiracy (*See* Criminal Law and Procedure, III.A.2.) in which the crime solicited or the crime contemplated by the conspiracy was not in fact committed, it is an affirmative defense that, under circumstances manifesting a voluntary and complete renunciation of his criminal purpose, the defendant prevented the commission of such crime (Penal Law § 40.10 [4]).

A renunciation is not "voluntary and complete" if it is motivated in whole or in part by (a) a belief that circumstances exist which increase the probability of detection or apprehension of the defendant or another participant in the criminal enterprise, or which render more difficult the accomplishment of the criminal purpose, or (b) a decision to postpone the criminal conduct until another time or to transfer the criminal effort to another victim or another but similar objective (Penal Law § 40.10 [5]).

J. Duress: Penal Law § 40.00

In any prosecution for an offense, it is an affirmative defense that the defendant engaged in the proscribed conduct because he was coerced to do so by the use or threatened imminent use of unlawful physical force upon the defendant or a third person, which force or threatened force a person of reasonable firmness in the defendant's situation would have been unable to resist. The defense of duress is not available when a person intentionally or recklessly places himself or herself in a situation in which it is probable that the person will be subjected to duress.

V. New York Constitutional and Procedural Protections

A. Detention and warrantless arrest: CPL 140.10

A police officer may arrest a person for any offense without a warrant when the police officer has reasonable cause to believe that the person has committed a crime in the presence of the police officer (CPL 140.10 [1]).

A police officer may arrest a person for a crime, i.e., a felony or a misdemeanor, as opposed to a lesser offense, without a warrant when the police officer has reasonable cause to believe that the person has committed a crime, whether or not in the presence of the police officer (CPL 140.10 [2]).

In the seminal case of *People v De Bour*, 40 NY2d 210 (1976), adhered to in *People v Hollman*, 79 NY2d 181 (1992), the Court of Appeals set out a four-tiered method for evaluating the propriety of encounters initiated by police officers:

> "At the first level, law enforcement may engage in minimally-intrusive questioning to request information 'when there is some objective credible reason for that interference not necessarily indicative of criminality' (*DeBour,* 40 NY2d at 223). The second level, the common-law right of inquiry, permits officers to gain explanatory information, . . . short of a forcible seizure' upon a 'founded suspicion that criminal activity is afoot' (*id.*). The third level, 'a forcible stop and detention,' requires the 'officer entertain [ ] a reasonable suspicion that a particular person has committed, is committing or is about to

> commit a felony or misdemeanor,' and '[a] corollary of the statutory right to temporarily detain for questioning is the authority to frisk if the officer reasonably suspects that [they are] in danger of physical injury by virtue of the detainee being armed' (*Id.* [citation omitted]). 'Finally[,] a police officer may arrest and take into custody a person when [the officer] has probable cause to believe that person has committed a crime or offense in [the officer's] presence' (*Id.* [citation omitted])" (*People v Parker*, 32 NY3d 49, 55-56 [2018]).

On what constitutes an unlawful seizure of a citizen, there are differences between federal law (*U.S. v Drayton*, 536 US 194, 200-202 [2002]) and New York law (*People v Bora*, 83 NY2d 531, 535-36 [1994]). Under federal law, "a seizure occurs 'when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen.'" (*California v Hodari D.,* 499 U.S. 621, 625 [1991], quoting *Terry v Ohio*, 392 U.S. 1, 19, n. 16 [1968]). Under New York law, the State Constitution does not require that an individual be physically restrained or submit to a show of authority before finding a seizure. Rather, the test is whether a reasonable person would have believed under the circumstances that the officer's conduct was a significant limitation on his or her freedom (*Bora,* 83 NY2d at 535).

Under both the State and Federal Constitutions, the protective pat-down exception to the warrant requirement authorizes a limited search of lawfully detained suspects to determine whether a weapon is present (*See Terry v Ohio,* 392 US 1 [1968], *People v Rivera,* 14 NY2d 441 [1964]). Unlike federal law, which permits a warrantless seizure of contraband the identity of which is readily apparent from a police officer's touch during a *Terry* pat-down (*Minnesota v Dickerson*, 508 U.S. 366 [1993]), New York law narrowly limits the scope of the intrusion authorized during a pat-down to what is necessary to ascertaining the presence of weapons (*People v Diaz*, 81 NY2d 106 [1993] [during a frisk the officer felt in the defendant's pocket what appeared to be a bunch of vials used to package a controlled substance; the warrantless seizure of the vials was not permitted]; *Matter of Andy E.*, 81 NY2d 948 [1993] [a warrantless search of a brown bag taken from the defendant's hand, which felt like it had hard objects inside, was not permitted]).

B. Search and seizure

1. With a warrant: CPL 690.05, 690.10, 690.15, 690.35

A local criminal court may, upon application of a police officer or a district attorney, issue a search warrant: (1) directing the officer to search a designated premises, vehicle or person for the purpose of seizing designated property and delivering it to the court which issued the warrant; or (2) directing the officer to search a designated premises for the purpose of arresting a person who is the subject of an arrest or bench warrant where the designated premises is the dwelling of a third person who is not the subject of the arrest warrant (CPL 690.05).

Personal property is subject to seizure pursuant to a search warrant if there is reasonable cause to believe that it:

- Is stolen;
- Is unlawfully possessed;

- Has been used, or is possessed for the purpose of being used, to commit or conceal the commission of an offense; or
- Constitutes evidence or tends to demonstrate that an offense was committed

(CPL 690.10).

A search warrant must direct a search of a designated or described place or vehicle or person and may also direct a search of any person at or in the place or vehicle (CPL 690.15).

An application for a search warrant may be made in writing or orally (subject to certain requirements outlined in CPL 690.36) (CPL 690.35 [1]). The application must contain, among other information:

- The name of the court and the name and title of the applicant for the search warrant;
- A statement that there is reasonable cause to believe that property may be found in the designated place, vehicle or person, or reasonable cause to believe that a person who is subject to the warrant may be found in the designated premises; and
- Allegations of fact supporting such statement based upon personal knowledge of the applicant or based upon information or belief. If the factual allegations are based upon information and belief, the source of such information and grounds for such belief must be stated

(CPL 690.35).

The cases of *People v Griminger* (71 NY2d 635 [1988]) and *People v Bigelow* (66 NY2d 417 [1985]) define unique differences between the United States Supreme Court and the New York Court of Appeals regarding search warrants.

In *Griminger*, the Court of Appeals declined to follow the United States Supreme Court in applying a "totality-of-the-circumstances" rule for reviewing the sufficiency of an informer's information for probable cause to support the issuance of a warrant. Under the federal rule, information from an undisclosed informant may be sufficient to support the issuance of a search warrant if, under the totality of the circumstances, there exists probable cause supporting its issuance (*Illinois v Gates*, 462 U.S. 213[1983]). The New York Court of Appeals decided to adhere to the more exacting requirement that the application for the search warrant must demonstrate both: (1) the veracity or reliability of the source of the information, and (2) the basis of the informant's knowledge.

In *Bigelow*, the Court of Appeals declined to follow the United States Supreme Court, which, by adopting a "good faith" exception to the exclusionary rule, refused to suppress evidence obtained when an officer acting with objective good faith had obtained a search warrant from a judge or magistrate and had acted within its scope, but the warrant was later determined to be invalid (*U.S. v Leon*, 468 US 897 [1984]). The New York Court of Appeals decided that such evidence should still be excluded on State constitutional grounds.

2. Without a warrant

New York law requires that for a warrantless emergency search, the search must not be primarily motivated by an intent to arrest and seize evidence (*People v Mitchell,* 39 NY2d 173, 177 [1976]) (*cf. Brigham City v Stuart* (547 US 398 [2006] [refusing to include this element as a matter of federal law]).

C. Confessions and privilege against self-incrimination

1. Right to counsel; indelible attachment

The New York constitutional right to counsel attaches indelibly in two situations. First, similar to the federal right, it attaches when formal judicial proceedings begin, whether or not the defendant has actually retained or requested an attorney (*People v West*, 81 NY2d 370, 373-374 [1993]). Second, unlike the federal right, it attaches when an uncharged individual has actually retained a lawyer in the matter at issue or, while in custody, has requested a lawyer (*Id.*; *see People v Ramos*, 99 NY2d 27 [2002]). The indelible attachment of the right to counsel means that such individual cannot be questioned in the absence of counsel (*See People v Lopez*, 16 NY3d 375 [2011]; *People v Bing*, 76 NY2d 331, 339 [1990]; *People v Hobson*, 39 NY2d 479, 481 [1976]). More specifically, once the right has attached, a defendant in custody cannot be interrogated in the absence of counsel on any matter, whether related or unrelated to the subject of the representation (*People v Rogers,* 48 NY2d 167, 169 [1979]*; Bing,* 76 NY2d at 340, 350). In New York, once an attorney enters the proceeding, a defendant in custody cannot in the absence of counsel waive his or her right to counsel (*Hobson*, 39 NY2d at 483).

2. Voluntariness

Procedurally, New York provides for an omnibus pre-trial motion (CPL 255.20) to resolve all pre-trial matters including the question of the voluntariness of a defendant's admission/confession. If a confession is not suppressed as the result of a pre-trial motion or if no pre-trial motion is made, the defendant is permitted to litigate the issue at trial (*People v Selby,* 53 AD2d 878 [2d Dept 1976], aff'd 43 NY2d 791[1977]; *People v Huntley*, 15 NY2d 72 [1965]).

Under the New York State Constitution, a statement given at a police station subsequent to an arrest in one's home, which arrest was illegal because it was made at the home without a warrant or exigent circumstances (*See Payton v New York*, 445 US 573 [1980]), must be suppressed, absent attenuation (*People v Harris*, 77 NY2d 434 [1991]). The doctrine of attenuation permits the statement to be admitted at trial despite the illegal arrest if the statement was acquired by means sufficiently distinguishable from the arrest so as to be purged of the illegality (*People v Bradford*, 15 NY3d 329 [2010]). Federal law is to the contrary (*See New York v Harris*, 495 US 14 [1990]).

D. Police-arranged identification procedures

1. In-court identification, Photographic identification: CPL 60.25, 60.30, 710.20

A witness who is able to make an in-court identification - that the witness observed a perpetrator commit a crime and based on a present recollection, the defendant is the perpetrator – is also permitted to testify that the witness subsequently identified the defendant in a properly conducted lineup or photographic identification (CPL 60.30). Under CPL 60.25, if a witness is unable to make an in-court identification based on a present recollection, the witness's prior identification in a properly conducted lineup or photographic identification may be established by a third-party witness. Under CPLR 60.25 and 60.30, both the testimony of the prior identification and the photographic evidence constitute evidence in chief.

New York courts historically precluded testimony about a prior identification of a defendant by photograph (*See People v Lindsay*, 42 NY2d 9 [1977]). Amendments to CPL 60.25 and CPL 60.30 have abrogated that decisional law, and testimony about a prior identification of a defendant by photograph is admissible provided the photographic identification was conducted pursuant to a blind procedure. A blind procedure is one whereby the police conducting the array do not know which person is the suspect or do not know where the suspect is placed in the array (CPL 60.25 [1] [c]). New York has a detailed standard protocol for the administration and documentation of photographic arrays (*See* Executive Law § 837 [21]). Police failure to follow the blind procedures may result in preclusion of the photo identification as evidence in chief, but will not by itself require suppression of the in-court identification (CPL 60.25 [1] [c]). Suppression is nonetheless warranted any time the photo identification is unconstitutionally suggestive (CPL 710.20 [6]).

2. Corporeal (showup/lineup) identification

Showup identifications are strongly disfavored in New York but are permissible if exigent circumstances require immediate identification, or even in the absence of exigent circumstances, when they are spatially and temporally proximate to the commission of the crime and not unduly suggestive (*People v Ward*, 116 AD3d 989 [2d Dept 2014], *lv denied* 23 NY3d 1069 [2014]).

Testimony regarding an identification made at a pre-trial lineup is properly admitted unless it is shown that the procedure was unduly suggestive. The prosecution has the initial burden of showing the reasonableness of police conduct in a pre-trial identification procedure, but the defendant bears the ultimate burden of proving that the procedure was unduly suggestive (*People v Jackson*, 98 NY2d 555 (2002). Evidence of an unduly suggestive, police-arranged pre-trial identification proceeding must be excluded at trial, as a matter of state, not federal, constitutional law (*People v Adams*, 53 NY2d 241, 250-252 [1981]).

If an unduly suggestive pre-trial identification procedure occurred, an in-court identification may be permitted only if the prosecution can demonstrate that a source independent of the pre-trial identification procedure exists for the witness's in-court identification (*People v Chipp,* 75 NY2d 327, 335 [2000]).

E. Open disclosure: CPL art 245

The prosecution must automatically disclose to the defendant or permit the defendant to discover, without demand, "all items and information that relate to the subject matter of the case" and that are in the possession, use or control of the prosecution or a law enforcement agency (CPL 245.20 [1]; [2]). The list of discoverable material and information is exhaustive (CPL 245.20 [1] [a] – [u]) and includes, but is not limited to, all evidence and information that is in any way favorable to the defendant, including any information known to law enforcement (CPL 245.20 [k]). The prosecution's disclosure must occur within 20 days after the defendant's arraignment on a felony or misdemeanor charge if the defendant is in custody, or within 35 days after the arraignment if the defendant is not in custody, which periods can be extended for up to an additional 30 days if the discoverable materials are exceptionally voluminous, or if they are not in the prosecution's actual possession despite good-faith efforts (CPL 245.10 [1] [a]). There are certain automatic timing extensions for some types of evidence, and the prosecution can seek court-ordered modification of discovery periods in an individual case based on good cause (CPL 245.70 [2]). The aforementioned automatic disclosure deadlines do not apply to charges for traffic offenses and other petty offenses (CPL 245.10 [1] [a] [iii]).

Upon completion of discovery, the prosecution must serve on the defendant and file with the court a certificate of compliance that states that after exercising "due diligence and making reasonable inquiries to ascertain the existence of material and information subject to discovery," the prosecutor has disclosed and made available all such known material and information (CPL 245.50). Absent an "individualized finding of special circumstances in the instant case," the prosecution will not be ready for trial for speedy trial purposes (*See* Criminal Law and Procedure, IV.F.) until the certificate of compliance is filed (CPL 240.50 [3]).

There is a reciprocal requirement on the defendant to disclose specific information that the defense intends to introduce at a trial or hearing (CPL 245.20 [4]) 30 days after service of the prosecution's certificate of compliance (CPL 245.10 [2]) and to serve on the prosecution and file with the court a certificate of compliance (CPL 245.50 [2]). A defendant may waive discovery from the prosecution in a signed writing at the time of arraignment or expeditiously thereafter but before receiving discovery from the prosecution (CPL 245.75). A defendant who waives discovery need not provide discovery to the prosecution. The prosecution may not condition a guilty plea offer on a waiver of discovery (*Id*).

Upon a felony complaint, when the prosecution has made a pre-indictment plea offer requiring a guilty plea to a crime, the prosecutor must disclose to the defense all discoverable items and information not less than three calendar days prior to the expiration date of any plea offer by the prosecution or any deadline imposed by the court for acceptance of the plea offer (CPL 245.25 [1]). When the prosecution has made any other plea offer requiring a guilty plea to a crime, the period of three calendar days is changed to seven calendar days (CPL 245.25 [2]).

F. Speedy trial guarantees: CPL 30.20 (1), 30.30

CPL 30.20 provides that after a criminal action is commenced, the defendant is entitled to a speedy trial (*See also* Civil Rights Law § 12). An unreasonable delay in prosecuting a defendant also constitutes a denial of the due process of law required by Article I, §6 of the New York Constitution (*People v Singer*, 44 NY2d 241, 253 [1978], *People v Staley*, 41 NY2d 789 [1977]). CPL 30.30 requires that the prosecution be ready and announce readiness for trial on all counts charged within a prescribed time frame. The time period for readiness varies with the severity of the offense and most homicide offenses are excluded from the statute (CPL 30.30 [3] [a]). The prosecution must generally be ready for trial within:

- 6 months if the most serious offense charged is a felony,
- 90 days if the most serious crime charged is a misdemeanor punishable by a term of imprisonment of more than three months,
- 60 days if the most serious crime charged is a misdemeanor punishable by a term of imprisonment of not more than three months, and
- 30 days if the only offense or offenses are non-criminal violations

(CPL 30.30 [1]).

Failure of the prosecution to be ready within the statutory period, which begins with the commencement of the action, may require that the action be dismissed.

An incarcerated defendant must be released from custody on bail or on his or own recognizance with reasonable restrictions if the prosecution is not ready for trial when the defendant has been incarcerated for:

- 90 days if the most serious offense charged is a felony,
- 30 days if the most serious crime charged is a misdemeanor punishable by a term of imprisonment of more than three months,
- 15 days if the most serious crime charged is a misdemeanor punishable by a term of imprisonment of not more than three months, and
- 5 days if the only offense or offenses are non-criminal violations

(CPL 30.30 [2]).

In computing the foregoing time periods, certain periods of delay may be excluded, including any continuance granted at the request or with the consent of the defendant and any delay caused by the unavailability of the defendant for various reasons (CPL 30.30 [4]).

When the prosecution declares itself ready, the court must make an inquiry on the record as to the prosecution's actual readiness, and the prosecution's statement of trial readiness must be accompanied by a certificate of good faith compliance with the disclosure requirements of CPL 245.20 (CPL 30.30 [5]).

The New York Court of Appeals has articulated criteria to be balanced in determining when the constitutional right to speedy trial has been violated. (Note: Because CPL 30.30 does not apply to homicide cases, a homicide defendant can rely only on the constitutional right.) The factors are: "(1) the extent of the delay; (2) the reason for the delay; (3) the nature of the underlying charge; (4) whether or not there has been an extended period of pretrial incarceration; and (5) whether or not there is any indication that the defense has been impaired by reason of the delay" (*People v Taranovich*, 37 NY2d 442, 445 [1975]).

Under federal law, a defendant must show both that the government caused the delay in order to obtain a tactical advantage and that actual prejudice resulted (*See United States v Gouveia*, 467 US 180, 192 [1984]; *People v Decker*, 13 NY3d 12, 14 [2009]). Under New York's more expansive approach, where the "delay is great enough there need be neither proof nor fact of prejudice to the defendant" (*People v Taranovich*, 37 NY2d 442, 447 [1975]).

G. Double jeopardy: CPL 40.10, 40.20, 40.30, 40.40; NY Const art 1, § 6; U.S. Const, Fifth Amendment

Both the New York and Federal Constitutions contain a Double Jeopardy Clause granting a defendant protection against a second prosecution for the same offense after acquittal or conviction (*See* NY Const art 1, § 6; U.S. Const, Fifth Amendment). CPL 40.20 (1) tracks the constitutional provisions ("A person may not be twice prosecuted for the same offense"). The meaning of "offense" is narrowly defined in CPL 40.10 (1), prohibiting "only prosecuting the same person twice under the same statute for the same act" (*Polito v Walsh,* 8 NY3d 683, 687 [2007], *cf. Blockburger v United States,* 284 US 299, 304 [1932] ["the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not"]).

New York provides statutory protections that are greater than the constitutional protections. CPL 40.40 generally prohibits prosecution for a second offense whenever the later charges could have been joined with the charges under a prior accusatory instrument in the same venue as part of the same criminal transaction.

The United States Supreme Court has consistently held that a subsequent state prosecution based on the same facts and conduct underlying a prior federal prosecution (and vice versa) is not violative of the double jeopardy proscription (the "dual sovereignties" doctrine) (*Gamble v United States*, 587 US _, 139 S Ct 1960 [2019]). CPL 40.20 (2) encompasses but is broader than the protection against successive prosecutions in the New York and Federal Constitutions. It rejects the dual sovereignties doctrine and instead dictates that a "person may not be separately prosecuted for two offenses based upon the same act or criminal transaction, unless one of nine exceptions apply" (CPL 40.20 [2]; *People v Abbamonte,* 43 NY2d 74, 81-82 [1998]).

The exceptions contained in CPL 40.20 (2) cover some common situations so as to permit prosecution for a second offense based upon the same act or transaction, such as when:

- One of the offenses consists of criminal possession of contraband and the other offense is one involving the use (other than a sale) of that contraband (CPL 40.20 [2] [c]);
- Each offense involves death, injury, loss or other consequence to a different victim (CPL 40.20 [2] [e]) (The different victims must be specific, individually identifiable victims, and cannot be just different classes of victims, such as taxpayers of a city or shareholders of a corporation (*Kaplan v Ritter*, 71 NY2d 222 [1978]);

- The second prosecution is for a consummated result offense, such as a homicide or larceny, which occurred in this state and is the result of a conspiracy, facilitation or solicitation prosecuted in another state (CPL 40.20 [2] [g]); or
- One of the offenses involves the evasion of federal income taxes and the other involves the evasion of New York state or city income taxes (CPL 40.20 [2] [i]).

H. Grand jury testimony/immunity: CPL 50.10, 190.40, 190.45, 190.50

Every witness in a grand jury proceeding must give any evidence legally requested, regardless of any protest or belief on one's part that it may tend to incriminate oneself (CPL 190.40 [1]). A witness who testifies in a grand jury proceeding is granted immunity, unless the witness agrees to waive immunity or the testimony is not responsive to a question and is gratuitously given or volunteered with knowledge that it is not responsive (CPL 190.40 [2]). A waiver of immunity may be a pre-condition to testifying for certain witnesses (e.g., a target or a witness for the target) (CPL 190.50 [4], [5]).

A witness testifying in court (or in certain other legal proceedings) who asserts the privilege against self-incrimination may be compelled to testify if granted immunity by the court upon the request of the prosecution (or by the appropriate authority in another proceeding) (CPL 50.20, 50.30).

A person in New York who receives immunity for testifying before a grand jury or in a court or other legal proceeding automatically receives "transactional" immunity as opposed to "use" immunity (CPL 50.10). Transactional immunity protects the witness from prosecution for, or on account of, any transaction, matter or thing concerning which the witness gave evidence, but the witness may be prosecuted for perjury for giving false testimony in such legal proceeding and may be adjudged in contempt for contumaciously refusing to give evidence (CPL 50.10 [1]). Use immunity only protects a witness against the government's use of his or her immunized testimony in a prosecution of the witness, except in a subsequent prosecution for perjury or giving a false statement.

New York grants a defendant, that is, a person against whom a criminal charge is being or is about to be or has been submitted to a grand jury, a right to appear before such grand jury as a witness in his own behalf' upon serving upon the district attorney proper written notice (CPL 190.50 [5]). A defendant, or any other witness who has signed a waiver of immunity, has a right to have his or her lawyer present in the grand jury room. The attorney may advise the witness but may not otherwise take any part in the proceeding (CPL 190.52). The defendant may request the grand jury to call other witnesses, but the decision whether to hear other witnesses on behalf of the defendant rests with the grand jury (CPL 190.50 [6]).

I. Accomplice testimony: CPL 60.22

A defendant may not be convicted of any offense upon the testimony of an accomplice unsupported by corroborative evidence tending to connect the defendant with the commission of the offense (*See* Evidence, III.A.).

EVIDENCE

NOTE: A more complete, free, on-line reference is the Guide to New York Evidence, which can be found at https://www.nycourts.gov/judges/evidence, the purpose of which, as set forth in Section 1.01 of the Guide is:

> **"In recognition of the absence of a New York statutory code of evidence, the objective of this Guide is to bring together in one document, for the benefit of the bench and bar, New York's existing rules of evidence, setting forth each rule with a note on the sources for that rule.**
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> **"Given that most of New York's evidentiary rules are not codified and that the New York Court of Appeals provides the controlling interpretation of the New York State constitution, statutes and common law, this Guide places particular emphasis on and adheres to the controlling precedents of the New York Court of Appeals."**

The information below is not intended to be as complete as the Guide but rather is intended to highlight rules which the Board has determined are either particularly significant or New York specific.

I. Judicial Notice

A. Judicial notice of law: CPLR 4511

Under CPLR 4511 (a), every court must take judicial notice, without a request being made, of the following:

- The common law, constitutions, and public statutes of the United States and of every state, territory, and jurisdiction of the United States;
- The official compilation of the New York Codes, Rules, and Regulations (NYCRR); and
- All local laws and county acts in New York.

Under CPLR 4511 (b), the court has discretion to take judicial notice on its own motion of, among other things, private acts and resolutions of the United States Congress and the New York State Legislature; and ordinances and regulations of agencies (unless included in NYCRR) or governmental subdivisions and the laws of foreign countries. The court must take judicial notice of the matters specified in subdivision (b) if a party requests it, furnishes the court sufficient information to enable it to comply with the request, and has given each adverse party appropriate notice as specified in the statute.

B. Judicial notice of facts

Judicial notice of facts is a matter of decisional law and occurs when a court, with or without request, accepts a fact as true without requiring proof of that fact (*Ptasznik v Schultz*, 247 AD2d 197 [2d Dept 1998]). New York limits judicial notice of facts to those that are:

- Of such common knowledge within the community where the court sits that they cannot reasonably be the subject of dispute, or
- Capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned, or
- Contained in undisputed records of a court

(Guide to NY Evid rule 2.01, Judicial Notice of Facts).

II. Relevancy

A. Character evidence: CPL 60.40

In general, evidence of a person's character is not admissible for the purpose of proving that the person acted in conformity therewith or had the propensity to do so (*People v Mullin*, 41 NY2d 475 [1977], *Noonan v Luther,* 206 NY 105 [1912]).

In a civil case, evidence of good character may be admitted only after a person's good character has been directly called into question by evidence of bad character (*Kravitz v Long Is. Jewish-Hillside Med. Ctr.*, 113 AD2d 577 [2d Dept 1985]).

Whenever evidence of a person's character is admissible, proof thereof generally may only be by testimony as to his or her general reputation in the community (*People v Barber*, 74 NY2d 653 [1989] [dissenting opinion], *People v Kuss*, 32 NY2d 436 [1973]). The individual opinion of a witness who knows the defendant personally and has firsthand knowledge of his or her character is inadmissible (*Id.*).

The foregoing general rules are subject to the following exceptions:

In some civil or criminal proceedings, character evidence may be admissible where that character is an essential element of a crime, charge, claim or defense, in which case the relevant character may be proved by reputation testimony and by proof of specific acts (*e.g., People v Mann*, 31 NY2d 253 [1972] [defense of entrapment]; *Park v New York Cent. & Hudson Riv. R.R. Co.*, 155 NY 215, 219 [1898] [liability for employing an intoxicated employee with intemperate habits]).

In a criminal proceeding, a defendant through the testimony of a witness called by the defendant may offer evidence of the defendant's own good character to show that it is unlikely that the defendant committed the particular offense charged (*People v Aharonowicz*, 71 NY2d 678 [1988]). Such evidence must consist of reputation evidence and must relate to character traits involved in the crime charged (*People v Miller,* 35 NY2d 65, 68 [1974]). If the defendant offers good character evidence, the prosecution may, in its rebuttal, offer testimony that the defendant's reputation with respect to the relevant character trait is bad (*See e.g., People v Richardson,* 222 NY 103 107 [1988]). The prosecution may also independently prove any previous conviction of the defendant which tends to negate the character trait in issue (CPL 60.40 [2]).

If a witness for a defendant offers reputation evidence with respect to the defendant's good character, that witness may be asked on cross examination whether the witness has heard that the defendant has been convicted of a crime or engaged in conduct (other than the crime for which the defendant is charged), that is inconsistent with that reputation (*People v Kuss* 32 NY2d 436 [1973]). Such inquiry cannot be used to prove the truth of such criminal conduct, but only to test the witness's ability to accurately reflect the defendant's reputation in the community. The prosecutor must act in good faith (*Id.*).

B. Uncharged crimes

In both civil and criminal proceedings,[7] evidence of a defendant's prior uncharged crimes is inadmissible to prove the defendant's propensity to commit the charged crime or act in issue, but may be admitted under certain circumstances where the probative value of the proof outweighs its possible prejudicial effect. Evidence of uncharged but similar acts is therefore admissible to establish, for example:

- Motive,
- Intent,
- Absence of mistake or accident,
- Identity,
- Common scheme or plan
- Opportunity,
- Preparation
- Conduct inextricably interwoven with the charged acts,
- Necessary background information or explanation, or
- A complete narrative of the subject event or matter

(*People v Molineux,* 168 NY 264 [1901]; *People v Santarelli*, 49 NY2d 241 [1980]; *People v Stanard*, 32 NY2d 143, 146 [1973]; *People v Cook*, 42 NY2d 204, 208 [1977]; *People v Vails*, 43 NY2d 364, 368 [1977]).

In a criminal proceeding, a two-part inquiry is required to determine the admissibility of evidence of a defendant's uncharged crimes or prior bad acts. First, the proponent must identify some material issue to which the evidence is relevant. Second, the court must weigh the probative worth of the evidence against its potential for delay, surprise and prejudice (*People v Alvino,* 71 NY2d 233, 242 [1987]).

C. Habit

Evidence of habit of a person or routine practice of an organization may be admitted in a civil action to establish that a person or organization acted in conformity with that habit on a particular occasion. The party seeking to introduce such evidence must establish that the habit or routine practice is “a deliberate and repetitive practice by a person in complete control of the circumstances” (*Rivera v Anilesh*, 8 NY3d 627, 633 [2007], citing *Halloran v Virginia Chems.,* 41 NY2d 386 [1977]), as opposed to “conduct however frequent yet likely to vary from time to time depending upon the surrounding circumstance” (*Halloran,* 41 NY2d at 389). Before proof of habit may be admitted, the proponent must show to the satisfaction of the court a sufficient number of instances of the conduct in question (*Id.* at 392).

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[7] Although the CPL contains some evidentiary rules specifically applicable to criminal proceedings, CPL 60.10 provides: "Unless otherwise provided by statute or by judicially established rules of evidence applicable to criminal cases, the rules of evidence applicable to civil cases are, where appropriate, also applicable to criminal proceedings."

III. Witnesses

A. Competency of witnesses: CPLR 4512, 4513, 4519; CPL 60.20, 60.22; FCA 343.1 (2)

CPLR 4512 provides that one spouse is competent to give testimony against the other spouse. Thus, under New York law, a witness-spouse is not excluded or excused from giving testimony about matters that might be damaging to the party-spouse; however, spouses are entitled to invoke a privilege for confidential communications in any type of proceeding (CPLR 4502; *see* Evidence, IV.A).

CPLR 4513 prescribes that a conviction of a crime does not render a witness incompetent. However, a witness’s convictions may be used on cross-examination to impeach his or her credibility (*See* Evidence, III.B.2.).

Under New York’s Dead Man’s Statute, any person “interested in the event” may not testify in his or her own behalf against the executor/administrator/survivor of a deceased person or the committee of a mentally ill person[8] concerning a transaction or communication with the decedent or mentally ill person (CPLR 4519). The statute expressly extends the prohibition to any person from whom the interested person obtained his or her interest, by assignment or otherwise and to any testimony against a person whose interest was derived from such decedent or mentally ill person, by assignment or otherwise. It also expressly provides that it does not render an interested person incompetent to testify as to the facts of an accident in an action involving a claim of negligence in the operation of a motor vehicle, aircraft or vessel.

Both Family Court Act § 343.1 (2) and CPL 60.20 (2) establish a rebuttable presumption that a child less than nine years old is incapable of giving testimony under oath. To overcome the rebuttable statutory presumption, the infant witness must demonstrate sufficient intelligence and capacity to justify the reception of his or her testimony, and that the witness knows, understands and appreciates the nature of an oath before the trial court may permit the sworn testimony (*People v Nisoff*, 36 NY2d 560 [1975]). If a witness cannot rebut the presumption or is under a mental defect, the court may nonetheless permit the witness to give unsworn evidence if the court is satisfied that the witness possesses sufficient intelligence and capacity to justify receipt of the evidence.

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[8] Although the statute uses the term “committee of a mentally ill person,” incompetency proceedings resulting in the appointment of a committee have been replaced by proceedings under Article 81 of the Mental Hygiene Law resulting in the appointment of a guardian, and thus the reference to a “committee” now means such a guardian (Laws of 1992, ch. 698, § 4), or a judicially appointed guardian ad litem of a person hospitalized for mental illness (Matter of Musczak, 196 Misc. 364 [Surr. Ct., N.Y. Co 1949]).

B. Impeachment

1. Inconsistent statements: CPLR 3117 (a) (1), 4514, 4517; CPL 60.35

In general, any previous statement made by a witness, oral or written, that is inconsistent with the present testimony of the witness may be used to impeach the credibility of the witness (*Larkin v Nassau Elec. R.R. Co*., 205 NY 267 [1912]).

A party may not impeach its own witness by evidence of a prior inconsistent statement except:

> In a civil proceeding a party may do so if the statement was made in a writing subscribed by the witness or was made under oath (CPLR 4514).
>
> In a criminal proceeding a party may do so by using a prior written statement or an oral statement made under oath where the prior statement contradicts the testimony of the witness upon a material issue which tends to disprove the position of the party (CPL 60.35 [1]). Such evidence may be received only for the purpose of impeaching the credibility of the witness with respect to his testimony upon the subject, and does not constitute evidence in chief. (CPL 60.35 [2]). When such prior inconsistent statement does not tend to disprove the position of the party who called the witness, evidence of such prior statement is not admissible, and such party may not use such prior statement for the purpose of refreshing the recollection of the witness in a manner that discloses its contents to the trier of the facts (CPL 60.35 [3]).

CPLR 3117 (a) (1) expressly provides that in a civil action the deposition of a party or nonparty may be used by any party for the purpose of contradicting or impeaching the deponent as a witness. Similarly, CPLR 4517 (a) (1) expressly provides that the prior trial testimony of a witness may be used by any party to contradict or impeach that witness if the witness testifies in a subsequent civil action involving the same parties and subject matter.

Under New York rules of evidence, while using an inconsistent statement to impeach a witness is permitted in a civil or criminal case as stated above, the admissibility of extrinsic evidence to contradict for the purpose of impeachment is prohibited with respect to collateral matters (*People v Pavao,* 59 NY2d 282, 289 [1983]). In contrast, if a witness testifies concerning a fact material to a case, the witness may be contradicted either by cross-examination or by introduction of extrinsic evidence (*People v Schwartzmann,* 24 NY2d 241, 245-246 [1969]).

2. Conviction of a crime: CPLR 4513; CPL 60.40

In a civil proceeding, use of a prior conviction to impeach a witness is governed by CPLR 4513. It provides:

> "A person who has been convicted of a crime is a competent witness; but the conviction may be proved, for the purpose of affecting the weight of his or her

> testimony, either by cross-examination, upon which he or she shall be required to answer relevant questions, or by the record. The party cross-examining is not concluded by such person's answer."

Thus, in a civil proceeding impeachment is limited to crimes, i.e., felonies or misdemeanors, and the crime can be proven by the record of conviction whether or not the witness denies it.

In a criminal proceeding, CPL 60.40 (1) authorizes the prosecution to independently prove a witness's prior conviction of an offense if, when properly asked, the witness denies it or equivocates. Thus, in a criminal proceeding a conviction of any crime or violation (but not a traffic infraction) may be used to impeach a witness, but the record of conviction may not be introduced into evidence unless the witness denies the conviction or equivocates.

A criminal defendant who chooses to testify may be impeached on cross-examination by inquiry about prior convictions or "criminal, vicious or immoral acts" that bear logically on that individual's credibility as a witness (*People v Sandoval*, 34 NY2d 371 [1974]). The prosecution must disclose evidence to the defendant of prior bad acts that will be offered into evidence under either *Molineux* (*See* Evidence, II.B.) or *Sandoval* not later than 15 days before trial (CPL 245.10, 245.20 [3]). A defendant may seek an advance ruling on what prior criminal, vicious or immoral acts the prosecution will be permitted to inquire about if the defendant takes the stand. In making such a ruling, the trial judge must balance the probative worth of evidence of prior specific criminal, vicious or immoral acts on the issue of the defendant's credibility, with the risk of unfair prejudice to the defendant. The defendant bears the burden of demonstrating that the probative value of such evidence on the issue of credibility is substantially outweighed by its potential for undue prejudice so as to warrant its exclusion (*Sandoval,* 34 NY2d at 378).

3. Specific instances of conduct

The credibility of a witness may be impeached on cross-examination by asking about prior specific criminal, vicious or immoral conduct of the witness, but only if:

- The nature of the conduct or the circumstances in which it occurred bears logically and reasonably on credibility,
- The question has a good faith basis,
- The question does not relate to a charged crime for which the witness was acquitted, and
- In a criminal case, if the witness is the defendant, any question about the prior conduct was authorized by the court prior to trial. For other witnesses in a criminal case, such prior authorization by the court is not required, but a party may seek an advance ruling addressed to the court's discretion regarding the permissible scope of cross-examination with respect to the prior conduct (*People v Ocasio*, 47 NY2d 55 [1979])

(*People v Smith*, 27 NY3d 652, 662 [2016]; *People v Santiago*, 15 NY2d 640, 641 [1964]; *People v Sandoval*, 34 NY2d 371 [1974]).

Subject to those same restrictions the credibility of a witness who testifies regarding another person's character may be impeached on cross-examination by asking the witness if the witness has heard of prior specific criminal, vicious or immoral conduct of that person (*People v Kennedy*, 47 NY 2d 196, 206 [1979]; *People v Kuss*, 32 NY 2d 436, 443 [1973]).

4. Reputation for truthfulness

In general, a party who is cross-examining a witness cannot introduce extrinsic documentary evidence or call other witnesses to contradict a witness's answers concerning collateral matters solely for the purpose of impeaching that witness's credibility (*People v Pavao*, 59 NY2d 282 [1983]). Where, however, the cross-examiner does not seek to contradict specific answers given by a witness, but attempts only to show that the witness has a bad reputation in the community for truth and veracity, other witnesses may be called to testify with respect to the witness's reputation for untruthfulness (*Id.*).

C. Expert testimony

1. Expert opinions

Opinion testimony of an expert is admissible to aid, but not displace, the jury in the discharge of its fact-finding function, where the conclusions to be drawn from the facts depend upon professional or scientific knowledge or skill not within the range of ordinary training or intelligence (*People v Inoa*, 25 NY3d 446, 472 [2015]). "For testimony regarding both the ultimate questions [to be decided by the jury] and those of lesser significance, admissibility turns on whether, given the nature of the subject, 'the facts cannot be stated or described to the jury in such a manner as to enable them to form an accurate judgment thereon, and no better evidence than such opinions is attainable'" (*People v Cronin*, 60 NY2d 430, 432 [1983] [internal citations omitted]). The admissibility and bounds of expert testimony are in the trial court's discretion [*Id.*].

Unless the court orders otherwise, questions calling for the opinion of an expert witness need not be hypothetical in form, and the witness may state his or her opinion and reasons without first specifying the data upon which it is based (CPLR 4515). However, the expert's testimony or the record must contain that data, and an expert who relies on facts within his or her personal knowledge and not contained in the record is required to testify to those facts prior to rendering the opinion *(People v Jones*, 73 NY2d 427, 430 [1989]). Although CPLR 4515 expressly states that upon cross-examination, the expert may be required to specify the data supporting his or her opinion that does not shift the burden to fill in the missing data to the other party (*Id.*).

An expert may rely on out-of-court material, such as a statement which has not been admitted into evidence and would be considered hearsay, if the material is of a kind accepted in the expert's profession as reliable in forming a professional opinion, provided there is evidence establishing its reliability, or if it is an out-of-court statement made by a witness subject to full cross-examination (*People v Sugden*, 35 NY2d 453 [1974]; *People v Stone*. 35 NY 69 [1974]).

In a criminal case, while an expert may rely on hearsay in reaching an opinion, the defendant's right of confrontation precludes the expert from testifying on direct examination to the content of a statement by a declarant who is unavailable for cross-examination (*People v Goldstein*, 6 NY3d 119 [2005]).

2. Scientific evidence

The introduction of scientific evidence based on a novel or experimental theory or technique (*People v Brooks,* 31 NY 2d 939, 941), and not on the personal training or experience of the witness (*People v Oddone*, 22 NY3d 369, 376 [2013]), requires a determination of its reliability. Such a determination is made using the *Frye* test, which asks whether the accepted techniques, when properly performed, generate results accepted as reliable within the scientific community. *Frye* holds that "while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs" (*Frye v United States*, 293 F 1013, 1014 [DC Cir 1923]). New York has not adopted the more relaxed standard for admissibility of expert testimony, relevance and reliability, as adopted by the Supreme Court in *Daubert v Merrell Dow Pharms*., 509 US 579 (1993) and used in the federal courts (*People v Wesley*, 83 NY2d 417, fn.2 [1994]). The *Frye* inquiry is a separate and distinct question from the admissibility question — whether there is a proper foundation to admit the evidence by establishing that the accepted techniques were properly and reliably applied to the facts of the case at hand (*Parker v Mobil Oil Corp.*, 7 NY3d 434 [2006]).

IV. Privileges

A. Marital communications: CPLR 4502, 4512

Although spouses are competent to testify for and against one another (CPLR 4512), a spouse shall not be required, or without the consent of the other spouse be allowed, to disclose a confidential communication made by one spouse to the other spouse during the marriage (CPLR 4502 [b]). The privilege applies to any medium of communication between the spouses -- oral, written, or recorded (*Matter of Vanderbilt [Rosner - Hickey]*, 57 NY2d 66, 73-74 [1982]). The confidential communications must be induced by the marital relationship and made in confidence (*People v Mills*, 1 NY3d 269, 276 (2003). The privilege will not attach to communications made by the spouses in the known presence of outsiders (*People v Ressler,* 17 NY2d 174 [1966]). The spousal privilege for confidential communications applies in all civil and criminal proceedings.

B. Attorney-client: CPLR 4503

Unless the client waives the privilege, any time legal advice is sought from the client's lawyer, all communications relating to that purpose that are made in confidence by the client are protected by the attorney-client privilege and cannot be disclosed by the lawyer. The presence of, or transmittal through, an employee of the attorney, such as a secretary or law clerk, will not destroy the privilege. But communications made in the presence of other third parties, whose presence is known to the client, are not privileged (*Baumann v Steingester*, 213 NY 328, 331 - 333 [1915]). For the privilege to apply, communications must be made for the purpose of providing legal advice or services in the course of a professional relationship (*Rossi v Blue Cross & Blue Shield of Greater N.Y.*, 73 NY2d 588 [1989]).

The attorney-client privilege extends to the attorney's own communications to the client. Likewise, corporations may invoke the attorney-client privilege for confidential communications with attorneys relating to their legal matters (*Id.*) For the privilege to apply when communications are made from client to attorney, they must be made for the purpose of obtaining legal advice and directed to an attorney who has been consulted for that purpose.

The privilege does not apply to:

- Information as to the preparation, execution or revocation of any will, revocable trust or other instrument in an action involving the probate, validity or construction of a will or, after the grantor's death, a revocable trust (CPLR 4513 [b]),
- Communications in furtherance of a fraudulent scheme, an alleged breach of fiduciary duty or an accusation of some other wrongful conduct (crime-fraud exception) (*Ulico Cas. Co. v Wilson, Elser, Moskowitz, Edelman & Dicker,* 1 AD3d 223 [1st Dept 2003]), or
- Relevant communications when litigation arises between the attorney and client (*Matter of Glines v Estate of Baird*, 16 AD2d 743 [4th Dept 1962]).

The attorney-client privilege is an evidentiary rule. A corollary of that rule is a lawyer's ethical obligations regarding confidential information (*See* Professional Responsibility, II.A).

C. Physician or other medical professional/psychologist-patient: CPLR 4504, 4507

Unless the patient waives the privilege, CPLR 4504 prohibits disclosure of any information acquired by a physician, registered or practical nurse, dentist, podiatrist or chiropractor "in attending a patient in a professional capacity, and which was necessary to enable him [or her] to act in that capacity." The privilege applies to information communicated by the patient or others or obtained from observation of the patient (*Edington v Mutual Life Insurance Co*., 67 NY 185, 194 [1876]. The privilege applies to information contained in a patient's medical files and expert testimony sought to be introduced at trial (*Williams v Roosevelt Hospital*, 66 NY2d 391 [1985]). A personal injury plaintiff impliedly waives the privilege as to medical conditions for which damages are sought (*Koump v Smith*, 25 NY2d 287 [1969]). Details about an accident communicated by a personal injury plaintiff to a medical professional that are unrelated to treatment or diagnosis and information that would be obvious to laymen are not privileged (*People v Decina*, 2 NY2d 133 [1956]; *Klein v Prudential Ins. Co. Of America*, 221 NY 449 [1917]).

Under CPLR 4507, confidential communications between a psychologist and a patient are placed "on the same basis as those provided by law between attorney and client" (*See* Evidence, IV.B.).

D. Self-incrimination: CPLR 4501

A witness may not refuse to testify on the ground that the testimony might expose the witness to civil liability. A witness is, however, entitled to avoid testifying to self-incriminating facts. The objection may be raised only to specific questions that the witness believes would require incriminating answers (*Matter of Agnello v Corbisiero*, 177 AD2d 445, 446 [1991], lv denied 79 NY2d 758 [1992]).

E. Other privileges

There are also privileges regarding confidential communications with members of the clergy (CPLR 4505), with social workers (CPLR 4508), and with rape crisis counselors and domestic violence advocators (CPLR 4510).

V. Hearsay and Circumstances of its Admissibility

A. Definition of hearsay

Oral or written out-of-court statements offered for the truth of the matters they assert are hearsay. They may be received into evidence only if they fall within one of the recognized exceptions to the hearsay rule,[9] and provided the proponent demonstrates that the evidence is reliable. In determining reliability, a court must decide whether the declaration was spoken under circumstances which render it highly probable that it is truthful (*Nucci v Proper*, 95 NY2d 597 [2001]).

B. Admissions

An admission is defined as an act[10] or declaration of a party which constitutes evidence against the party at trial. "[A]dmissions by a party of any fact material to the issue are always competent evidence against [that party], wherever, whenever or to whomsoever made" (*Reed v McCord*, 160 NY 330, 341 [1899]), irrespective of the party's lack of personal knowledge of the facts asserted (*Id.)*. The hearsay statement of an agent is admissible against the agent's principal under the New York admissions exception to the hearsay rule only if the making of the statement is an activity within the scope of the agent's authority (*Loschiavo v Port Auth. of NY & NJ,* 58 NY2d 1040 [1983]). In New York if an individual is acting in both an individual and a representative capacity, an admission made in one capacity is not admissible against that individual in the other capacity (*Commercial Trading Co v Tucker*, 80 AD2d 779 [1st Dept 1981]). Note that admissions are admissible under an exception to the rule against hearsay in New York; under the Federal Rules of Evidence, admissions are non-hearsay and the capacity in which an individual is acting is not relevant (Fed Rules Civil Pro rule 801 [d]).

C. Present sense impressions

The present sense impression exception to the hearsay rule is available when the statement describes or explains an event or condition and was made while the declarant was perceiving the event or condition, or immediately thereafter, and the content of the statement is corroborated by independent proof (*People v Brown*, 80 NY2d 729 [1993]). In New York, a "marginal time lag" is allowed between the event and the description by the declarant (*See People v Vasquez*, 88 NY2d 561 [1996]). The corroboration offered to support admission of the statements must serve to support the statements' substance and content; the corroboration element cannot be established merely by showing that the statements were unprompted and were made at or about the time of the reported event (*Id.*). What corroboration is sufficient depends on the circumstances of each case. The declarant's descriptions need not be corroborated by a witness at the scene with an equal opportunity to perceive the event, but there must be some evidence to assure the court the statement sought to be admitted was made spontaneously and contemporaneously with the event described (*Brown*, 80 NY2d at 730).

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[9] These materials cover examples to the hearsay rule that are primarily New York specific. For all of the exceptions recognized in New York, see Guide to NY Evid., Article 8. New York has no "residual exception" similar to Federal Rules of Evidence 807 (*People v Nieves*, 67 NY2d 125, 131 [1986]).

[10] Examples of acts which may constitute hearsay are a victim pointing to identify an assailant or nodding in answer to a question (*See People v Nieves*, 67 NY2d 125, 138 n. 1 [1986]; *People v Madas,* 201 NY 349, 354 [1911]).

D. Business records: CPLR 3122-a, 4518, 4539; State Technology Law §§ 305, 306

Under the business records hearsay exception, a business record may be admitted to prove the truth of its contents. The requirements under this exception are as follows:

- The document must be "made in the regular course of any business,"
- At the time of the act or occurrence recorded or within a reasonable time thereafter,
- Where it was the regular course of such business to make that record, and
- The person who made the record either must have had actual knowledge of the act or occurrence or must have received his or her information from someone within the business who had actual knowledge and was under a "business duty" to report the event. The lack of personal knowledge by the maker of the record may affect its weight but not its admissibility

(CPLR 4518; *Johnson v Lutz*, 253 NY 124, 128 [1930]).

Statements contained in a business record which were made by third parties not within the same business as the maker of the record are not admissible unless permitted under some other exception to the hearsay rule (*Matter of Leon RR*, 48 NY2d 119, 122-123 [1979]).

Section 305 of the State Technology Law provides that "[a]n electronic record shall have the same force and effect as those records not produced by electronic means." Furthermore, "an electronic record or electronic signature may be admitted into evidence" subject to Article 45 of the CPLR (State Technology Law § 306). CPLR 4518 (a) expressly provides that an electronic record shall be admissible in a tangible exhibit that the court determines is a true and accurate representation of such electronic record.

Generally, under the best evidence rule original records must be produced absent proper foundation for the introduction of secondary evidence. However, the use of copies or reproductions of documents is permitted if the copies were also prepared in the regular course of business (CPLR 4539 [a]). And optically-scanned images of business records that were originally in documentary form are admissible when authenticated by competent testimony or affidavit that includes the manner or method by which tampering or degradation of the reproduction is prevented (CPLR 4539 [b]). Such authentication is not required for records that were originally created electronically (*People v Kangas*, 28 NY3d 984 [2016]).

CPLR 3122-a provides for a certification procedure when the records sought from a nonparty are business records. The certification must be sworn in the form of an affidavit and signed by the custodian or other person charged with responsibility for maintaining the records. Certification of a nonparty's business records, as a substitute for in-court testimony, is permitted without the need for production pursuant to subpoena, thus permitting nonparties to voluntarily produce and certify business records, including any who are outside the state and thus beyond the reach of the subpoena power (*See* Civil Practice and Procedure, IX.A.). Even if a party has satisfied the foundation requirements of CPLR 4518 through the certification procedure in CPLR 3122-a, the issue of whether the documents will be admissible will be governed by the rules of evidence (*Siemucha v Garrison*, 111 AD3d 1398, 1400 [4th Dept 2013]).

E. Statements for purposes of medical diagnosis and treatment: CPLR 4518 (c)

Hospital records fall within the business records exception to the hearsay rule as long as the information relates to the diagnosis, prognosis or treatment of a patient or the records are otherwise helpful to an understanding of the medical or surgical aspects of the hospitalization (*Williams v Alexander*, 309 NY 283 [1955]). In determining the admissibility of statements in medical records, the inquiry is whether the statements at issue were relevant to diagnosis and treatment of the patient (*People v Ortega*, 15 NY3d 610 [2010]). Details as to how a particular injury occurred that are not useful for purposes of medical diagnosis or treatment are generally not considered to have been recorded in the regular course of a hospital's business (*Williams*, 309 NY at 288).

However, in the context of domestic violence, sexual assault, and child abuse cases, how a patient was injured is germane to diagnosis and treatment because it concerns not only how to treat physical injuries, but also any psychological and trauma issues which may need to be addressed and the development of a safety plan upon discharge (*Ortega*, 15 NY3d at 619). It is irrelevant that a secondary motive for the inquiry regarding the mechanism of the injury may be to fulfill an ethical and legal duty to report abuse (*People v Duhs*, 16 AD3d 405 [2011]).

F. Former testimony, including depositions: CPLR 4517; CPL 670.10

The trial testimony of any witness taken at a prior trial involving the same parties and arising from the same subject matter may be used by any party to contradict or impeach that witness if the witness testifies in the subsequent civil action (CPLR 4517 [a] [1]).

A party's testimony at a prior trial involving the same parties and arising from the same subject matter is admissible as evidence in chief when it is offered by any party who is "adversely interested" when the prior testimony is offered, including the prior trial testimony of any person who, at the time the testimony was given, was an officer, director, member, employee, or managing or authorized agent of a party (CPLR 4517 [a] [2]).

CPLR 4517 (a) (3) establishes a hearsay exception for testimony by a witness given at a prior trial involving the same parties and arising from the same subject matter, provided the court finds that:

- The witness is not available because of death, age, sickness, infirmity or imprisonment;
- The witness is more than 100 miles from the place of trial, or out of state, unless the absence was procured by the party offering the testimony;
- Attendance cannot be procured despite diligent efforts of the party offering the testimony; or
- Exceptional circumstances exist making its use desirable.

The prior testimony of a physician at a prior trial involving the same parties and arising from the same subject matter may be used by any party without the need to show unavailability or special circumstances, provided the admission of the prior testimony is not prejudicial under the circumstances (CPLR 4517 [a] [4]).

In the criminal context, CPL 670.10 provides that testimony given by a witness at a prior criminal trial or preliminary hearing may be received into evidence at a subsequent proceeding in or relating to the same action when, at the time of such subsequent proceeding, the witness:

- Is unable to attend by reason of death, illness or incapacity,
- Cannot with due diligence be found, or
- Is outside the state or in federal custody and cannot with due diligence be brought before the court.

The "subsequent proceedings" at which such testimony may be admitted include "[a]ny proceeding constituting a part of a criminal action based upon the charge or charges which were pending against the defendant at the time of the witness's testimony and to which such testimony related" and any post-judgment proceeding challenging conviction(s) based on that charge (CPL 670.10).

MATRIMONIAL AND FAMILY LAW

I. Getting Married

A. Same sex, void and voidable marriages and recognition of common law marriage: DRL 5, 6, 15, 15-a

A marriage that is otherwise valid is valid regardless of whether the parties to the marriage are of the same or different sex (DRL 10-a). New York defines and declares void "incestuous" and "bigamous" marriages (DRL 5, 6). An incestuous marriage is a marriage between an ancestor and a descendant, between a brother and sister of either the whole or the half-blood; or between an uncle and niece or an aunt and nephew (DRL 5).

Marriages in which either party is under the age of 18 are prohibited and voidable (DRL 15-a). Marriages where either party lacks mental capacity or physical capacity, or consents to marriage due to force, duress or fraud, are also voidable (DRL 7).

New York does not permit common law marriages; however, as a matter of comity, it will recognize out-of-state marriages (domestic and foreign) and common law marriages if validly entered under the laws of another jurisdiction (*Mott v Duncan Petroleum Trans.*, 51 NY2d 289 [1980]). There are two categories of exception: (1) marriages prohibited by positive law in New York, and (2) marriages involving incest or polygamy (*Martinez v County of Monroe*, 50 AD3d 189, 191-92 (4th Dept [2008]). Once a marriage is recognized as valid in New York, it is valid in all respects and is terminated only by annulment, divorce or death.

B. Pre-nuptial and post-nuptial contracts: DRL 236 (B) (3); GOL 5-701 (a) (3)

Agreements made before the marriage (pre-nuptial) or during the marriage (post-nuptial or separation) are valid and enforceable provided they are:

- In writing;
- Subscribed by both parties; and
- Acknowledged or proven in the same manner as required for the recording of a deed (*See* Real Property Law, IV.C.; Appendix C).

(DRL 236 [B] [3]; *see Galetta v Galetta*, 21 NY3d 186 [2013]).

II. Matrimonial Actions

A. Separation and matrimonial settlement agreements: DRL 236 (B) (3)

Pre-nuptial contracts, post-nuptial contracts, separation agreements, and agreements settling a matrimonial action determine the rights and obligations of each party to the other party under the Domestic Relations Law. Such agreements complying with DRL 236 (B) (3) are valid and enforceable in the same manner as an ordinary contract and may include provisions:

- Agreeing to make a testamentary gift of any kind or waiving of the spousal right of election *(See* Trusts, Wills and Estates, III.B.)
- Dividing separate and marital property,
- Setting the amount and duration of maintenance (*But see* Matrimonial and Family Law, IV.A.), and
- Relating to the custody, care, education and support of any child of the parties (*But see* Matrimonial and Family Law, IV.B., XI.A.).

Based on the fiduciary relationship between spouses, marital agreements are more closely scrutinized by courts than ordinary contracts and judicial review is exercised sparingly (*Christian v Christian,* 42 NY2d 63, 72 [1977]). An agreement which is fair on its face will be enforced according to its terms unless there is proof of fraud, duress, or unconscionability, or if there is a showing of manifest unfairness because of the other spouse's overreaching (*Christian,* 42 NY2d at 72; *Levine v Levine,* 56 NY2d 42, 47 [1982]).

B. Grounds: DRL 170

A spouse seeking divorce in New York may do so under a number of statutory grounds (*See* DRL 170 [1] – [7]), but currently the ground commonly used is the "no-fault" ground of "irretrievable breakdown of the marriage" (DRL 170 [7]). To establish this ground, one spouse need only state under oath that the relationship has broken down irretrievably for a period of at least six months prior to the commencement of an action (*Id.*). Before a divorce may be granted based on this ground, all economic issues of equitable distribution, the payment or waiver of spousal support, the payment of attorney's fees, and custody and visitation, must be resolved between the parties or determined by the court (*Id.).*

C. Subject matter jurisdiction, durational residency requirements: DRL 230

In order to have jurisdiction over the marriage or marital res, New York requires as a prerequisite to commencement of a matrimonial action that:

- Both parties be residents (residence = domicile) of New York at the time the action is commenced and the cause of action occurred in New York; or
- One of the parties is a resident of New York and has been for one continuous year immediately preceding the action if:
    - the parties were married in New York,
    - the parties resided as spouses in New York, or
    - the cause of action occurred in New York, or
- One of the parties is a resident of New York and has been for two continuous years immediately preceding the action.

D. Personal jurisdiction: CPLR 302 (b)

New York's long-arm statute permits exercise of personal jurisdiction over a non-resident defendant in any matrimonial action involving a demand for economic relief, including equitable distribution of marital property if the plaintiff is a resident or domiciliary of New York and one of the following requirements is met:

- New York was the matrimonial domicile of the parties before their separation,
- The defendant abandoned the plaintiff in New York, or
- The claim for economic relief accrued under New York law.

E. Pleadings and service of process: DRL 211, 232, 236 (B) (2) (b), 253, 255

A matrimonial action is commenced by the filing of a summons and verified complaint or summons with notice (DRL 211; *see* Civil Practice and Procedure, II.A.). A summons with notice in an action for divorce must state on its face that it is an "Action for a Divorce" and must specify the relief being sought, e.g., maintenance, child support, custody and other forms of matrimonial relief (DRL 232 [a]). All pleadings in a matrimonial action must be verified (DRL 211; *see* Appendix C). Service of process must be by personal delivery absent a court order authorizing substitute service (DRL 232).

Defendants must be served with a copy of the "Automatic Orders" simultaneously with service of the summons (DRL 236 [B] [2] [b]). These orders, which are effective upon service, remain in effect during the pendency of the action and prevent either party from unilaterally changing the economic status quo of the relationship by disposing of property, incurring debts, removing the other party or the children from existing medical insurance, or changing beneficiaries on existing insurance policies.

In addition to the Automatic Orders, defendants must be served with a notice that medical insurance coverage may terminate upon entry of a judgment of divorce (DRL 255) and a Notice of Guideline Maintenance explaining the circumstances under which spousal maintenance may be awarded (DRL 236 [B] [6] [g]; *see* Matrimonial and Family Law, IV.A.).

F. Compulsory financial disclosure and statement of net worth: DRL 236 [B] [4]; 22 NYCRR 202.16

Domestic Relations Law 236 [B] [4] requires compulsory disclosure in matrimonial actions under Article 31 of the CPLR (*See* Civil Practice and Procedure, IX.) and a sworn statement of net worth with certain documents accompanying the statement (DRL 236 [4]). A statement of net worth contains a listing of a spouse's total assets and income and of the spouse's total liabilities and fixed financial obligations. The form of net worth statement is provided by court rule (22 NYCRR 202.16 [b]). Net worth statements must be accompanied with a current and representative paycheck stub, the most recently filed state and federal income tax returns, and copies of the W-2 wage statements submitted with the federal returns. The parties are also required to supply information relating to group health insurance plans and other medical benefits which would be available for any minor children whom the parties are obligated to support. By court rule, each party is required to submit a copy of a signed retainer agreement with counsel with the statement of net worth (22 NYCRR 202.16 [c]; *see* Professional Responsibility, IV.A.).

G. Counsel Fees

Domestic Relations Law 237 authorizes the court in a matrimonial action to award counsel fees and expert fees. The amount to be awarded is within the discretion of the court, having regard to the circumstances of the case and of the respective parties. There is a rebuttable presumption that counsel fees must be awarded to the less monied spouse. Applications for the award of fees and expenses may be made at any time prior to final judgment (*See O'Shea v O'Shea*, 93 NY2d 187 [1999]).

III. Equitable Distribution: DRL 236 (B) (4), 236 (B) (5)

Courts determining equitable distribution of marital property must consider 15 distinct factors (and any other factor the court deems just and proper) and set forth in any decision which factors they relied upon in distributing marital property (DRL 236 [B] [5] [d]; [g]). Marital fault is not one of the factors; however, egregious marital fault may be considered in rare cases involving extreme misconduct (*See O'Brien v O'Brien,* 66 NY2d 576, 589-590 [1985]; *Blickstein v Blickstein,* 99 AD2d 287, 292 [2d Dept 1984]). Additionally, one of the discrete factors considered by the court is "whether either party has committed an act or acts of domestic violence, as described in [the social services law], against the other party and the nature, extent, duration and impact of such act or acts" (DRL § 236 B (5)(d)(14)). There is no presumption of equal division and an unequal distribution of marital property may be awarded in cases involving economic fault (*Kaprov v Stalinsky,* 145 AD3d 869 [2d Dept 2016]). Courts may, in lieu of equitable distribution, make a distributive award to achieve equity between the parties (DRL 236 [B] [5] [e]) and make an order regarding exclusive use and occupancy of the marital home and its household effects (DRL 236 [B] [5] [f]).

A. Marital property: DRL 236 (B) (1) (c), 236 (B) (5)

Marital property is all property acquired by either or both spouses during the marriage and before the execution of a separation agreement or the commencement of a matrimonial action, regardless of the form in which title is held (DRL 236 [B] [1] [c]; *O'Brien,* 66 NY2d at 576. Marital property includes inter-spousal gifts (DRL 236 [B] [1] [d]), pension benefits (*Majauskas v Majauskas*, 61 NY2d 481 [1984]), and professional practices (*Litman v Litman,* 93 AD2d 695 (2d Dept 1983), *affd* 61 NY2d 918 [1984]). Professional licenses and degrees were once considered marital property subject to equitable distribution (*See O'Brien,* 66 NY2d at 576) but courts are now barred from considering "the value of a spouse's enhanced earning capacity arising from a license, degree, celebrity goodwill, or career enhancement" as marital property (DRL 236 [B] [5] [d] [7]). However, in arriving at equitable distribution of marital property, a court must consider a spouse's direct or indirect contributions to the enhanced earning capacity of the other spouse (*Id.*).

B. Separate property: DRL 236 (B) (1) (d)

Separate property is property not subject to equitable distribution and is defined as:

- Property acquired before the marriage or property acquired by bequest, devise, or descent, or by gift from a party other than the spouse;

- Compensation for personal injuries;
- Property acquired in exchange for separate property;
- Any increase in value of separate property, except to the extent that such appreciation is due in part to the contributions or efforts of the other spouse; and
- Property described as separate property by a valid written agreement of the parties.

Courts apply the definition of marital property "broadly" and the definition of separate property "narrowly" (*Fields v Fields,* 15 NY3d 158,162-163 [2010], quoting *Price v Price,* 69 NY2d 8, 15 [1986]). Property acquired during the marriage is presumed to be marital property, and the party seeking to overcome the presumption has the burden of proving that the property in dispute is separate property (*Fields,* 15 NY3d at 158).

Separate property may be commingled with and transformed into marital property through deposit into a joint account or into joint names (*Fessenden v Fessenden*, 307 AD2d 444 [3d Dept 2003]). Thus, if a spouse places separate property into joint names, a presumption of gift arises which, unless rebutted, results in the conclusion that the property is thereafter to be treated as marital property (*Id.*).

The appreciation in value of separate property during the marriage due to the non-titled spouse's direct or indirect contributions, as parent and homemaker, is also considered a marital asset (*Price,* 69 NY2d at 8*)*. When a non-titled spouse's claim to appreciation in the other spouse's separate property is predicated solely on the non-titled spouse's indirect contributions, some nexus between the titled spouse's active efforts and the appreciation in the separate asset is required (*Hartog v Hartog*, 85 NY2d 36, 46 [1995]). However, if the appreciation is not due, in any part, to the efforts of the titled spouse, but to the effect of unrelated factors including inflation or other market forces, the appreciation remains separate property (*Price,* 69 NY2d at 8).

IV. Dependent Support

A. Spousal maintenance: DRL 236 (B) (5-a), 236 (B) (6), 236 (B) (9); FCA 412

1. Calculation and duration

Except where the parties have entered into an agreement providing for maintenance, courts must award both temporary and post-divorce maintenance employing a mathematical formula based upon the parties' respective incomes (up to an income cap adjusted periodically for inflation) (DRL 236 [B] [5-a], DRL 236 [B] [6]). (The same formula applies to spousal support sought in a Family Court proceeding [FCA 412]. "Income" means income as defined in the Child Support Standards Act (*See* Matrimonial and Family Law, IV.B.). There are two different formulas depending on whether or not there is child support to be paid for the children of the marriage and, if so, which party is the custodial parent. The court may adjust the guideline amount of temporary or permanent maintenance where it finds the guideline amount unjust or inappropriate, and award additional maintenance where there is income over the cap, based on one or more statutory factors (DRL 236 [B] [5-a] [h] [1], DRL 236 [B] [6] [e] [1]). Post-divorce maintenance terminates on the death of either party or the remarriage of the payee spouse (DRL 236 [B] [6] [f] [3]).

The court has discretion to determine the duration of post-divorce maintenance by reference to a schedule contained in DRL 236 (B) (6) (f) that is based on the length of the marriage. The schedule is advisory only and not exact. For example, if the parties were married for 12 years, the guideline would advise that maintenance be payable for 1.8 to 3.6 years. In making its determination, whether or not the court uses the advisory schedule, it must consider a number of statutory factors unrelated to the length of the marriage (DRL [B] [6] [e] [1]).

A maintenance provision in an agreement made before or during the marriage must be fair and reasonable at the time of making the agreement and not unconscionable at the time of entry of a judgment of divorce (DRL 236 [B] [3]). A maintenance provision is void if it would result in a spouse being incapable of self-support and likely to become a public charge (GOL 5-311; *Krochalis v Krochalis*, 53 AD2d 1010 [4th Dept 1976]).

2. Modification

A party seeking to modify a prior order or judgment as to maintenance must establish the recipient's inability to be self-supporting; or a substantial change in circumstance, including financial hardship; or actual full or partial retirement of the payor if the retirement results in a substantial change in financial circumstances; or a termination of child support (DRL 236 [B] [9] [b] [1]). A party seeking to modify a maintenance award derived from an agreement must establish extreme hardship on either party. The court may not reduce or annul maintenance arrears that accrued prior to the date of the application to modify, except if the defaulting party shows good cause for failure to apply for relief from the order (DRL 236 [B] [9] [b] [1]). Interference with visitation rights can be the basis for the cancellation of arrears of maintenance and the prospective suspension of maintenance (DRL 241). The court may terminate maintenance in its discretion upon proof that the payee is habitually living with another person and holding himself or herself out as the spouse of such other person, although not married (DRL 248).

B. Child support: DRL 240 (1-b); FCA 413

1. Calculation, definition of income, waiver

Parents in New York are liable for support of a child until age 21 or earlier emancipation (DRL 240 [1-b] [b] [2]; FCA 413). For children born out of wedlock, paternity is a prerequisite to a child support order. New York has adopted the Child Support Standards Act (CSSA) to provide uniform guidelines in the determination of child support awards (DRL 240 [1-b]) (The same formula applies to child support sought in a Family Court proceeding [FCA 413]). The CSSA sets forth a rigid formula for calculating child support by applying a designated statutory percentage, based upon the number of children to be supported, to combined parental income up to a statutory cap adjusted periodically for inflation. The resulting sum is "basic" child support or the regular periodic payment of support. Basic child support is increased by "add-ons", which are obligations for child care expenses (DRL 240 [1-b] [c] [4]), health insurance premiums (DRL 240 [1-b] [c] [5]), and unreimbursed health expenses (DRL 240 [1-b] [c] [5] [v]). These expenses are divided between the parties pro rata based on each party's income. Educational expenses may also be awarded in the court's discretion (DRL 240 [1-b] [c] [7]). Marital fault is expressly excluded from consideration in the determination of child support (DRL 236 [B] [7] [a]).

Income is defined in the statute as the amount reported by each parent as his or her gross income on the most recent federal income tax return, plus, to the extent not included in the tax return, net investment income, workers' compensation benefits, disability benefits, unemployment insurance benefits, social security benefits, veterans' benefits, pension and retirement benefits, fellowships and stipends, and annuity payments (DRL 240 [1-b] [b] [5]). The statute permits certain reductions from income, i.e.: the amounts for (a) unreimbursed employee business expenses (except to the extent that such expenses reduce personal expenses); (b) alimony or maintenance actually paid to a prior spouse; (c) alimony or maintenance actually paid to the other party to the action, provided that there will be an adjustment in child support when the alimony or maintenance terminates; (d) child support actually paid on behalf of children other than those involved in the pending action; (e) public assistance; (f) supplemental social security income; (g) New York City or Yonkers income or earning taxes actually paid; and (h) federal insurance contributions act (FICA) taxes actually paid (DRL 240 [1-b] [b] [vii]).

Where both maintenance and child support are to be calculated, maintenance is to be calculated first, since the amount of maintenance is to be subtracted from the payor's income and added to the payee's income for child support purposes (DRL 236 [B] [6] [c] [1] [g]).

With respect to combined parental income exceeding the cap, the court has discretion to apply the statutory child support percentage or apply the factors set forth in DRL 240 (1-b) (f) (the "subparagraph f factors"), but it must set forth in a decision the reasons for its determination. The CSSA applies in shared custody situations (*Bast v Rossoff*, 91 NY2d 723 [1998]).

A separation agreement may not effectively release either parent from the statutorily imposed obligation to support children under the age of 21 (*Matter of Hoppl v Hoppl*, 50 AD2d 59 [3d Dept 1987] affd 40 NY2d 993 [1976]). The parties may "opt out" or deviate from the CSSA provisions so long as the decision is made knowingly and pursuant to DRL 240 (1–b) (h), which requires specific recitals in the written matrimonial agreement. A court is not bound by an agreement that fails to provide for adequate support for the parties' children.

2. Modification

A party seeking to modify a child support obligation derived from an agreement incorporated but not merged into a judgment of divorce[11] prior to October 30, 2010 must establish that the agreement was unfair or inequitable when entered into; or that an unanticipated and unreasonable change in circumstances has occurred resulting in a concomitant need of the child; or that the needs of the child are not being adequately met (*Matter of Boden v Boden*, 42 NY2d 210 [1977], *Matter of Brescia v Fitts*, 56 NY2d 132 [1982]).

A party seeking to modify a child support agreement made after October 30, 2010, or contained in a judgment of divorce that incorporated but did not merge the agreement or stipulation of the parties, must show a substantial change in circumstances (DRL 236 [B] [9] [b] [2] [i]). In addition, unless the parties have specifically opted out in a validly executed agreement, the court may modify an order of child support where:

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[11] A separation agreement or stipulation of settlement that does not specifically provide for survival beyond a final judgment of divorce is merged with that judgment and, as a result, "retains no contractual significance" (quoting *Minarovich v Sobala,* 121 AD2d 701, 701 [2d Dept 1986]).

- Three years have passed since the order was entered, last modified or adjusted; or
- There has been a change in either party's gross income by 15 percent or more since the order was entered, last modified, or adjusted. A reduction in income shall not be considered as a ground for modification unless it was involuntary and the party has made diligent attempts to secure employment commensurate with the party's education, ability, and experience

(DRL 236 [B] [9] [b] [2] [ii]).

There can be no modification of child support, and the court may not reduce or annul child support arrears, for any reason or for any period prior to the initiation of an application for such modification (DRL 236 [B] [9] [b] [2] [iii]). Under New York law, a parent's interference with visitation can be the basis for the prospective suspension of child support but only if the parent's actions rise to the level of deliberate frustration or active interference (*Ledgin v. Ledgin*, 36 AD3d 669 [2d Dept 2007]). However, interference with visitation is not a basis to cancel child support arrears or a defense to an application to enforce child support (DRL 241; *Patrick v. Botsford,* 177 AD3d 1146 [3d Dept 2019]). There are several factors that a court may consider on a motion for downward modification of child support, including whether "a supporting parent's claimed financial difficulties are the result of that parent's intentional conduct" (*Matter of Knights v Knights*, 71 NY2d 865, 866 [1988]).

Domestic Relations Law 240 (2) requires that all support orders be payable through the support collection unit unless the parties have stipulated to an alternate payment arrangement (*See* Social Services Law § 111-h [a support collection unit is established by a social services district]). Pursuant to DRL 240 (c), a cost-of-living review and adjustment is available every two years where the child support order is made on behalf of a child in receipt of public assistance or where enforcement is being undertaken through the support collection unit.

V. Parentage

A. Presumption of legitimacy: FCA 417; DRL 24, 175

A child born of parents who enter into a civil or religious marriage at any time prior or subsequent to the birth of the child, or who have consummated a common law marriage valid under the laws of another jurisdiction, is deemed the legitimate child of both parents, regardless of the validity of the marriage (FCA 417; DRL 24). The presumption of legitimacy applies equally to same-gender married couples (*See Matter of Christopher YY v Jessica ZZ*, 159 AD3d 18 [3d Dept 2018]). The legitimacy of the child is not affected by a subsequent judgment of separation or divorce (DRL 175) but may, under certain circumstances, be superseded by the doctrine of equitable estoppel (*See* Matrimonial and Family Law, V.D.).

B. Establishing paternity: FCA 418, 511, 532

The Family Court Act grants the Family Court exclusive original jurisdiction in proceedings to establish paternity, except that in adoptions the Surrogate's Court has jurisdiction concurrent with the Family Court to determine issues relating to paternity. (FCA 511; *see* Matrimonial and Family Law, X.). Although Supreme Court enjoys "general original jurisdiction in law and equity" (N.Y.S. Const., Art. 6, §§ 7[a] and 13[d]), as a matter of discretion it rarely, if ever, entertains a paternity matter, except in the context of a matrimonial proceeding.

A court, on its own motion or on the motion of any party, may order the mother, the child, and the alleged father to submit to genetic marker or DNA tests (FCA 418). Such tests are admissible unless a timely objection is made, and, if they show paternity to a degree of certainty of 95% or more, create a rebuttable presumption of paternity (FCA 418, 532).

C. Parentage proceedings: FCA art. 5-C

1. In general

Article 5-C creates a civil proceeding which results in a "judgment of parenthood" establishing the child-parent relationship for a child born as a result of either assisted reproductive technology or surrogacy agreements. The intended parents may, but need not be, married (FCA 581-204). The proceeding involves the filing of a verified petition by, among others, the child, a parent, a person claiming parentage, a social services agency, or a "participant" (defined as an individual who either provides a gamete used in assisted reproduction, or is an intended parent, a surrogate, or the spouse of an intended parent or surrogate (FCA 581-102 [o], 201 [b], [c]). A judgment of parentage may be made prior to, but does not take effect until, the child's birth (FCA 201 [b]). The petition may be filed in Supreme, Family or Surrogate's Court (FCA 581-206). The records of court proceedings are sealed, but the parties and child have a right to access the entire court record including the name of the surrogate and any known donors (FCA 581-205).

2. Assisted reproduction

Assisted reproduction means a method of causing pregnancy other than sexual intercourse and includes: (1) intrauterine or vaginal insemination, (2) donation of gametes, (3) donation of embryos, (4) in vitro fertilization and transfer of embryos, and (5) intracytoplasmic sperm injection (FCA 581-102 [a]).

In cases of assisted reproduction, the petition must include (1) a statement that an intended parent has been a resident of New York for at least six months, or if an intended parent is not a New York resident, that the child will be or was born within 90 days of filing, (2) a statement from the gestating parent that the pregnancy resulted from assisted reproduction, (3) if there is a non-gestating intended parent, a statement from both intended parents that the non-gestating parent consented to assisted reproduction, and (4) proof of any donor's donative intent (FCA 581-202 [c]).

If a child is born to a married woman by means of assisted reproduction, the consent of both spouses is presumed (FCA 581-304) unless the spouses are legally separated (FCA 581-305

[b]). Neither spouse may challenge the presumption unless the court finds by clear and convincing evidence that one spouse used assisted reproduction without the knowledge and consent of the other spouse (FCA 581-305).

The judgment of parentage declares that upon the birth of the child, the intended parent is the legal parent of the child and must assume responsibility for the maintenance and support of the child, and that any donor is not a parent of the child (FCA 581-202 [g]).

3. Surrogacy agreements

The Family Court Act sets forth who is eligible to enter surrogacy agreements and other requirements for surrogacy agreements (FCA 581-402; 403).

The surrogate at the time the agreement is executed must, among other requirements, be at least 21 years of age, not have provided the egg used to conceive the child, be a U.S. citizen or lawful permanent resident (and, where at least one intended parent is not a resident of New York for six months, be a resident of New York State for at least six months), complete a medical evaluation, and give informed consent after being informed of medical risks (FCA 581-402 [a]).

Surrogacy agreements involving a surrogate who is genetically related to the child remain contrary to public policy and are void and unenforceable (DRL 121, 122).

The surrogate has a right to the following, to be provided, and where applicable paid for, by the intended parent or parents:

- Comprehensive health insurance coverage, including mental health counseling, through the entire surrogacy process and for 12 months after the pregnancy ends;
- Reimbursement for or payment of any insurance copayments or out-of-pocket medical expenses;
- A disability insurance policy;
- A life insurance policy;
- The right to be represented by independent legal counsel;
- The right to select a health care professional of her own choosing;
- The right to terminate the pregnancy;
- The right to compensation for the surrogacy, which must be held by an independent escrow agent;
- The right to be provided with a copy of the Surrogate's Bill of Rights

(FCA 581-402 [a] [1] – [9]; 581-403).

At least one intended parent must be a United States citizen or lawful permanent resident and a resident of New York for at least six months (FCA 581-402 [b] [1]). The intended parent or parents may be a single adult or, if a couple, may be married or in an intimate relationship (*Id.* at [b] [3]). An intended parent in a spousal relationship may execute a surrogacy agreement without the spouse if they have lived apart for three years or have lived apart pursuant to an order, judgment or separation agreement acknowledged in the manner of a deed. The intended parent or parents must also have independent legal representation (*Id.* at [b] [2]).

The surrogacy agreement must be in a signed record[12] verified or executed before two non-party witnesses by each intended parent, the surrogate, and the spouse of the surrogate, if any, unless the surrogate and her spouse have lived apart for three years or have lived apart pursuant to an order, judgment or separation agreement acknowledged in the manner of a deed (FCA 581-403 [a]). The agreement must also contain, among other information, the name of the attorney representing each party (*Id.* at [h] [5]). A surrogacy agreement may be terminated before the surrogate becomes pregnant by giving notice of termination in a record to all other parties (FCA 581-405).

The judgment of parentage declares that upon the birth of the child, the intended parent or parents is or are the only legal parent or parents of the child and must assume responsibility for the maintenance and support of the child and the surrogate, spouse of the surrogate, and any donor, are not the legal parent of the child (FCA 581-202 [g]).

4. Compensation of donors and surrogates

Any compensation paid to donors and surrogates must be reasonable, must be negotiated in good faith, must not be contingent upon any purported quality or genome-related traits of the gametes or embryos or upon any characteristics of the child born as a result of the pregnancy, and cannot be paid for the purchase of gametes or embryos or for the release of any parental interest in a child (FCA 581-502).

A surrogate who is receiving no compensation may waive any rights to have the intended parent or parents provide her with or pay for any insurance, an attorney or any expense reimbursement (FCA 581-502 [a], [6], [7], [8]).

5. Acknowledgement of parentage

An acknowledgement of parentage may be executed by an unmarried or married person and another person who is a genetic parent or who is the intended parent of the child conceived through assisted reproduction (FCA 516-a; Public Health Law § 4135-b; Social Services Law 111-k). The form must be executed in the presence of two witnesses unrelated to the signatories. Once executed, it establishes the parentage of a child and liability for support of that child equal to an order of parentage (Public Health Law § 4135-b [1] [i]). In the absence of an acknowledgement of parentage, a paternity proceeding is required before a child support order can be rendered by a court (*Id.* at 4135-b [1] [ii]).

A signatory to an acknowledgement of parentage who was at least age 18 at the time of signing has the right to rescind the acknowledgement within 60 days after signing, and a signatory under the age of 18 has up to 60 days after the signatory attains the age of 18 to rescind the acknowledgement. If it is earlier, and whatever the age of the signatory, the time to rescind may be 60 days after the date on which the respondent is required to answer a petition (including, but not limited to, a petition to establish a support order) relating to the child. After such times, a rescission may only be based on fraud, duress or material mistake of fact (Public Health Law § 4135-b [2] [c], [d], [e]).

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[12] A record is defined in the Family Court Act as information inscribed in a tangible medium or stored in an electronic or other medium that is retrievable in perceivable form (FCA 581-102 [p]).

D. Doctrine of equitable estoppel in paternity: FCA 418, 532

Genetic marker or DNA tests will not be ordered if a court finds that it is not in the best interests of the child on the basis of res judicata, equitable estoppel, or the presumption of legitimacy of a child born to a married woman (FCA 418 [a], 532 [a]).

The paramount concern in such cases is the best interests of the child. "The purpose of equitable estoppel is to preclude a person from asserting a right after having led another to form the reasonable belief that the right would not be asserted, and loss or prejudice to the other would result if the right were asserted. The law imposes the doctrine as a matter of fairness" (*Matter of Shondel J. v Mark D.,* 7 NY3d 320, 326 [2006]).

The doctrine has been applied as both a sword and a shield (*compare Matter of Shondel J. v Mark D.,* 7 NY3d 320 [2006] [the respondent, who represented himself as the father of a child born out of wedlock, was equitably estopped from denying paternity even though a blood genetic marker test later confirmed that he was not the child's biological father, and was required to pay child support, since the child justifiably relied on respondent's representation of paternity by forming a bond with him to the child's detriment] *with Matter of Juanita A. v Kenneth Mark N,* 15 NY3d 1 [2010] [the respondent biological father was entitled to assert an equitable estoppel defense in paternity and child support proceedings brought by petitioner mother, when the mother had acquiesced in the development of a close relationship between the child and another father figure, and it would have been detrimental to the child's interests to disrupt that relationship]).

Equitable estoppel may be applied to overcome the presumption of legitimacy for a child born during a marriage, even when the presumption cannot be rebutted by clear and convincing evidence, as long as it is in the best interest of the child to do so (*Onorina CT v Ricardo RE*, 172 AD3d 726 [2d Dept 2019]; *see also Chimienti v Perperis*, 171 AD3d 1047 [2d Dept 2019]).

VI. Child Protective Proceedings

The statutes setting forth reasons for, and the procedures for, removing a child from the care of the child's parents, temporarily or permanently, or otherwise interfering with or supervising a parent-child relationship are extensive and are primarily found in the Social Services Law, Article 6, and the Family Court Act, Articles 6, 10 and 10-a. Only a few of the more significant provisions of those statutes are summarized here. A lawyer practicing in this area must be familiar with, and carefully analyze, all of the applicable statutes.

A. Abuse and neglect: FCA art 10

Child neglect and abuse proceedings are governed by Article 10 of the Family Court Act and apply to any parent or other person legally responsible for a child's care (i.e., child's custodian, guardian, or any other person responsible for the child's care at the relevant time) and who is alleged to have abused or neglected or allowed to be abused or neglected a child under the age of 18.

An abused child is one whose parent or other legally responsible person abuses by inflicting or allowing physical injury, or creating or allowing a substantial risk of physical injury, by other than accidental means, which causes or creates a substantial risk of death, or serious or protracted disfigurement, or protracted impairment of physical or emotional health or protracted loss or impairment of the function of any bodily organ (FCA 1012 [e] [i], [ii]). An abused child is also one who is sexually abused by the commission of any of the enumerated sexual offenses (FCA 1012 [e] [iii]).

There are two requirements for the finding of a neglected child. First, there must be proof that a child's "physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired" (FCA 1012 [f] [i]). Second, the actual or threatened harm to the child must be a consequence of the parent failing to exercise a minimum degree of care in:

- supplying the child with adequate food, clothing, shelter, education or medical care, though financially able to do so; or
- providing the child with proper supervision; or
- unreasonably inflicting or allowing to be inflicted harm, or a substantial risk of harm, including the infliction of excessive corporal punishment, or misusing drugs or alcohol; or
- any other acts of a similarly serious nature

(FCA 1012 [f] [i] [A], [B]).

A parent's abandonment of his or her child also constitutes neglect (FCA 1012 [f] [ii]).

Part 2 of Family Court Act Article 10 permits the temporary pre-petition removal of a child from the child's residence with or without court approval if the child is suspected to be abused or neglected. Part 3 sets forth various preliminary proceedings, and Part 4 sets forth the requirements for a hearing in an abuse or neglect proceeding. Neglect at a fact-finding hearing must be established by a preponderance of the evidence (FCA 1046 [b] [1]), and there must be a "causal connection between the basis for the neglect petition and the circumstances that allegedly produce the child's impairment or imminent danger of impairment" (*Nicholson v Coppetta*, 3 NY3d 357, 369 [2004]). Special evidentiary rules are applicable to Article 10 proceedings, including the admissibility of prior out-of-court statements made to third parties, which would otherwise be inadmissible hearsay (FCA 1046 [a] [vi]; *see also* Matrimonial and Family Law, XI, A.). Upon an adjudication of neglect or abuse after a hearing, Part 5 provides the court with a number of dispositional alternatives.

B. Voluntary surrender, termination of parental rights, permanency hearings: Social Services Law 383-b, 384, 384-b; FCA 611, 622, 1089

The guardianship of the person and the custody of a child under the age of 18 who is not in foster care may be voluntarily surrendered by the child's parent or parents to an authorized agency (Social Services Law 384 [1]).

Family Court Article 6 and Social Services Law 384-b govern the permanent termination of parental rights by reason of permanent neglect. A "permanently neglected child" is defined as a child who is in the care of an authorized agency and whose parent or custodian has failed for at least one year or 15 out of the most recent 22 months following the date the child was placed into the care of an authorized agency to substantially and continuously maintain contact with or plan for the future of the child, although physically and financially able to do so, notwithstanding the agency's diligent efforts to encourage and strengthen the parental relationship when such efforts will not be detrimental to the best interests of the child (FCA 614 [1]); Social Services Law § 384-b [7] [a]). Once there is a finding of permanent neglect based on clear and convincing evidence (FCA 622), the child is freed for adoption and all of the rights and obligations between the neglected child and his or her parent or custodian are severed and the child may be available for adoption.

Family Court Article 10-a governs permanency hearings and applies whenever a child is placed outside of the home. A permanency hearing generally must be scheduled no later than six months from the date which is 60 days after the child was removed from his home (FCA 1089 [a] 2]). Dispositional alternatives, include, but are not limited to, return to parent, placement for adoption, permanent placement with a relative, or the mandated filing of an action to terminate parental rights (FCA 1089 [d]).

VII. Family Offense Proceedings: FCA 812, 842; DRL 240 (3)

Acts which constitute a family offense include disorderly conduct, harassment, sexual abuse, stalking, criminal mischief, menacing, assault, and numerous other specified Penal Law crimes (FCA 812 [1]). The predicate act must occur between members of the same family or household (i.e., persons related by blood, persons who are married, persons who were formerly married, and persons who have a child together) or persons who are or have been in an intimate relationship regardless of whether such persons have lived together at any time.

Where a family offense has occurred, the court may issue an order of protection directing the respondent to stay away from the home, school, business, place of employment or other location of any other party or the child or directing the respondent to refrain from committing a family or criminal offense against any other party or the child or from harassing, intimidating or threatening such persons (FCA 842). The duration of an order of protection may be for up to two years or under aggravating circumstances for up to five years. Supreme Court may also enter an order of protection in any matrimonial action or custody or visitation proceeding (DRL 240 [3]).

The Family Court and criminal courts have concurrent jurisdiction over acts which constitute family offenses (FCA 812). In some counties, Integrated Domestic Violence courts are

established in Supreme Court to bring before a single judge criminal, family court and matrimonial disputes.

VIII. Adolescent Offender, Juvenile Offender, Juvenile Delinquency, and Persons in Need of Supervision: CPL art 722; FCA 301.2, 712.

The age of criminal responsibility in New York is 18 (Penal Law § 30.00 [1]; *see* Criminal Law and Procedure, IV.B.). A youth under the age of 18 who is charged with a felony is prosecuted as an "adolescent offender" or a "juvenile offender" in the "Youth Part" of a superior court (CPL art 722; *see* Criminal Law and Procedure, I.). A youth under age 18 who is charged with a misdemeanor is subject to adjudication as a juvenile delinquent in Family Court (FCA 301.2).

An "adolescent offender" is a 16-year-old or 17-year-old who is charged with any felony (CPL 1.20 [44]). A "juvenile offender" is a 13-year-old, 14-year-old, or 15-year-old who is criminally responsible for acts constituting certain violent felonies (CPL 1.20 [42]). The Youth Part is a criminal court independent of Family Court and all other criminal courts and is presided over by trained Family Court judges (CPL 722.10). A juvenile offender is still eligible to be adjudicated a "youthful offender," which is a non-criminal disposition that avoids the stigma and consequences of a felony conviction (CPL 720.20 [10] [a], [b]).

Both adolescent offenders and juvenile offenders charged in the Youth Part may nonetheless have their felony complaint removed to Family Court under certain circumstances where they will no longer be subject to criminal liability. These circumstances include the reduction of the felony charge to a misdemeanor and a removal in the interests of justice (CPL 722.22, 722.23).

A person in need of supervision (PINS) is defined as a person less than 18 years of age who is required by his or her age to attend school but is habitually truant or who is "ungovernable or habitually disobedient" and beyond the lawful control of a parent or who commits certain enumerated Penal Law offenses (FCA 712 [a]). Detention of a PINS in a secure or non-secure detention facility is prohibited (FCA 712 [b]).

IX. Attorney for the Child: FCA 241, 249; 22 NYCRR 7.2

Minors who are the subject of Family Court proceedings should be represented by counsel of their own choosing or by assigned counsel (FCA 241). The appointment of an "attorney for the child" is mandatory in certain proceedings including juvenile delinquency proceedings, PINS proceedings, and abuse and neglect proceedings (FCA 249). In any other proceeding, the appointment is discretionary. The sole criterion for appointment is whether "independent legal representation is not available" (*Id.*). There is no financial means test for the child or for the parents and reimbursement by the parents to the state is not required.

The attorney for the child is subject to the same ethical requirements applicable to all lawyers in a case (22 NYCRR 7.2). In juvenile delinquency and PINS proceedings, where the child is the respondent, the attorney for the child must zealously defend the child. In other types of proceedings where the child is the subject of the proceeding (i.e., custody, visitation, family offense, abuse and neglect), the attorney for the child must zealously advocate the child's position. If the child is capable of knowing, voluntary and considered judgment, the attorney for the child should be directed by the wishes of the child, even if the attorney for the child believes that what the child wants is not in the child's best interests. When the attorney for the child is convinced either that the child lacks the capacity for knowing, voluntary and considered judgment, or that following the child's wishes is likely to result in a substantial risk of imminent, serious harm to the child, the attorney for the child would be justified in advocating a position that is contrary to the child's wishes. In these circumstances, the attorney for the child must inform the court of the child's articulated wishes if the child wants the attorney to do so, notwithstanding the attorney's position.

X. Adoption: FCA 641; DRL 114, 117, 122

The Family Court has original jurisdiction concurrent with the Surrogate's Court over adoption proceedings (FCA 641).

In any adoption proceeding, the court must be satisfied that the best interests of the child are being promoted (DRL 114).

Under Domestic Relations Law 117, the order of adoption has the effect of severing all of the legal ties previously existing between the adoptive child and his or her birth parents. The biological parents are relieved of all rights and obligations vis-a-vis the child, including the obligation of financial support and the right of contact. The legal effect of an adoption order is to make the adoptive child the child of the adoptive parents and divest the biological parents of their relationship to the child (*See* Trusts, Wills and Estates, A.).

A. Who may adopt: DRL 110

The following persons can adopt in New York:

- An adult single person,
- An adult married couple together, or
- Any two unmarried adult intimate partners.

The third category was added in 2010 to codify and broaden the ability of domestic partners to undertake a joint adoption. An adult or minor married couple together may adopt a child of either of them born in or out of wedlock, and an adult or minor spouse may adopt such a child of the other spouse (DRL 110).

B. Who may be adopted: DRL 110

Any person, minor or adult, may be adopted (DRL 110).

C. Required consent: DRL 111

For an adoption in New York, Domestic Relations Law 111 (1) requires consents from the following individuals:

- Child if over the age of 14,
- Parents of a child conceived or born in wedlock,
- Mother of a child born out of wedlock,

- Father of a child born out of wedlock, or
- Any person or authorized agency having lawful custody of a child subject to the limitations in the following paragraphs

The consent of a parent shall not be required if the parent has abandoned the child as evinced by a failure for a period of six months to visit the child and communicate with the child (DRL 111 [2] [a]).

For an out-of-wedlock child under the age of six months at the time of placement for adoption, the consent of the father is required only if: (i) such father openly lived with the child or the child's mother for a continuous period of six months immediately preceding the placement, and (ii) openly held himself out to be the father of such child during such period; and (iii) paid a fair and reasonable sum, in accordance with his means, for the medical, hospital and nursing expenses incurred in connection with the mother's pregnancy or with the birth of the child (DRL 111 [1] [f]).

For an out-of-wedlock child placed with the adoptive parents more than six months after birth, the consent of the father is required only if the father maintained a substantial and continuous relationship with the child by means of financial support according to his means and either monthly visitation with the child, when physically and financially able to do so, or regular communication with the child (DRL 111 [1] [f]).

If the adoptive child is over the age of 18 years, the consent of the parents of the child is not required (DRL 111 [4]).

D. Sealing of adoption records: DRL 114

DRL 114 directs the sealing of adoption records to prevent the birth parents from locating the child and interfering with the relationship between the child and the adoptive parents and to protect the privacy of the birth parents (*Matter of Estate of Walker*, 64 NY2d 354 [1985]). Access to the sealed records may be obtained only for good cause on due notice to the adoptive parents. Usually, but not always, the good cause necessary to obtain inspection of adoption records may be shown by a genuine medical necessity.

Adoptive parents are entitled to disclosure of the child's medical history and limited information pertaining to the biological parents at the time of birth, including heritage, education, general physical appearance, occupation, health and medical history (DRL 114 [1]).

By statute, an adoption information registry is maintained by the New York State Department of Health and non-identifying information about the biological parents may be available to the adopted person at age 18 (Public Health Law § 4138-c).

Adopted persons upon reaching 18 years of age are entitled to a certified copy of their original long form birth certificate revealing the identity of their biological parents (Public Health Law § 4138-e). If an adopted person was born outside of, but adopted within, New York, so that the original birth certificate is not available, the adopted person is entitled to the identifying information that would have appeared on the original birth certificate (*Id.*).

E. Birth parents' rights post-adoption: DRL 112-b; Social Services Law § 383-c

Agreements for post-adoption contact and communication between the adoptive child and adoptive parents and birth parents and/or the adoptive child's siblings are recognized in both agency adoptions resulting from a voluntary surrender and private adoptions and may be judicially enforced if the agreement is in writing and consented to by all parties (DRL 112-b; Social Services Law 383-c; *In re Andie B*., 102 AD3d 128 (3d Dept [2012]). The agreement must be in the best interest of the child and must be incorporated into a written court order. However, where parental rights have been terminated, the court does not have the discretionary authority to provide for contact between the child and the biological parent (*Matter of Hailey ZZ. [Ricky ZZ.]*, 19 NY3d 422 [2012]).

F. Inheritance rights post-adoption

The rights of an adoptive child to inheritance and succession from and through the child's birth parents terminates upon the making of the order of adoption (DRL 117 [b]), except (a) when a birth or adoptive parent, having lawful custody of a child, marries or remarries and consents that the stepparent may adopt such child, such adoption does not affect the rights of such consenting spouse and such adoptive child to inherit from and through each other and the birth and adopted kindred of such consenting spouse (DRL117 [d]), and (b) with regard to certain other intrafamily adoptions as set forth in the statute (DRL 117 [e]).

An adoptive parent or parents and an adoptive child have all the rights of inheritance from and through each other and the birth and adopted kindred of the adoptive parents or parent (DRL 117 [c]), and the right of inheritance of an adoptive child extends to the distributees of such child (DRL 117 [f]). Also, adoptive children and birth children have the right of inheritance from each other, which right extends to the distributees of such adoptive children and birth children the same as if each such child were the birth child of the adoptive parents (DRL 117 [g]).

XI. Child Custody: DRL 240 (1); 25 USC §§ 1901, 1911 (Indian Child Welfare Act)

A. Best interests of the child standard: DRL 70, 240 (1)

Neither parent has a prima facie right to custody (DRL 240 [1] [a]; *Friederwitzer v Friederwitzer,* 55 NY2d 89, 93 [1982]).

Where custody between two parents is contested, the court in its discretion may determine custody "as, in the court's discretion, justice requires, having regard to the circumstances of the case and of the respective parties and to the best interests of the child" (DRL 240 [1] [a]).

Among the circumstances to be considered in determining the best interests of the child are the quality of the home environment and the parental guidance the custodial parent provides for the child, the ability of each parent to provide for the child's emotional and intellectual development, the financial status and ability of each parent to provide for the child, and the relative fitness of the respective parents, as well as the length of time the present custody has continued

(*Eschbach v Eschbach*, 56 NY2d 167, 172 [1982]). The best interests of the child are determined by a review of the "totality of the circumstances, including the existence of [a] prior award" (*Friederwitzer,* 55 NY2d at 96). A child's preference is not binding and is just one factor to be considered by the court. A trial court in a custody proceeding has discretion to interview a child in the absence of the child's parents or their counsel and a transcript of the confidential interview with the child may be sealed (*Lincoln v Lincoln,* 24 NY2d 270 [1969]; *cf. In re Justin CC*, 77 AD3d 207, 209-210 [2010] [a child's testimony at the fact-finding stage of a neglect or abuse proceeding is fundamentally different and will not be sealed or cloaked with confidentiality]).

Where a party to an action concerning custody or a right to visitation alleges in a sworn pleading that the other party has committed an act of domestic violence against a family member, and such allegation is proven by a preponderance of the evidence, the court must consider the effect of such domestic violence upon the best interests of the child (DRL 240 [1] [a]).

B. Custody and visitation rights of de facto parents and others

A biological parent has a right to the care and custody of a child superior to that of all others. "The State may not deprive a parent of the custody of a child absent surrender, abandonment, persisting neglect, unfitness or other like extraordinary circumstances" (*Bennett v Jeffrey*s, 40 NY2d 543, 544 (1976). If such extraordinary circumstances are present, only then may the court proceed to inquire into the best interests of the child (*Bennett*, 40 NY2d at 549).

Courts recognize the importance of regular and frequent visitation between the child and the noncustodial parent. "[A]bsent exceptional circumstances, such as those in which it would be inimical to the welfare of the child or where a parent in some manner has forfeited his or her right to such access, appropriate provision for visitation or other access by the noncustodial parent follows almost as a matter of course" (*Weiss v Weiss*, 52 NY2d 170, 175 [1981] [internal citations omitted]).

Grandparents of a minor child have standing to seek visitation where either or both of the grandchild's parents are dead or in any circumstances which warrant the equitable intervention of the court (DRL 72 [1]). Once standing exists, visitation for the grandparent or grandparents is appropriate if it is in the best interest of the child. In extraordinary circumstances, a grandparent or grandparents of a minor child residing within New York may obtain custody of the child. Extenuating circumstances include a prolonged separation of the parent and the child for at least 24 continuous months during which the parent voluntarily relinquished care and control of the child and the child resided in the household of the grandparent or grandparents (DRL 72 [2]).

Where circumstances show that conditions exist which equity would see fit to intervene, a sibling of a child may obtain such visitation rights as the best interest of the child may require (DRL 71).

Aside from permission granted to certain non-parents by DRL 71 and 72, Domestic Relations Law 70 expressly permits only a "parent" to petition for custody or visitation but the definition of parent has been left to the courts. The Court of Appeals has held that a non-biological, non-adoptive parent who can prove by clear and convincing evidence an agreement with the biological parent of the child to conceive and raise the child as co-parents is a "parent" for this purpose and may attain visitation rights or custody (*Brooke S. B. v Elizabeth A.C.C.*, 28 NY3d 1, 28 [2016], *overruling Alison D. v Virginia M,* 77 NY2d 651 [1991]).

C. Types of custodial arrangements

Custodial arrangements include sole custody, joint legal custody and joint physical custody. The Court of Appeals established the standard that joint custody should be reserved "for relatively stable, amicable parents behaving in mature civilized fashion." (*Braiman v Braiman*, 44 NY2d 584, 589 [1978]; *but see J.R. v M.S.*, 55 NYS3d 873 [NY Sup Ct 2017] [analysis of how courts historically decided custodial disputes and a discussion of current trends]).

D. Enforcement: DRL art 5-A (UCCJEA)

New York has adopted the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) (DRL 75).

E. Modification of custody, relocation: FCA 467, 652

Modification of an existing custody or visitation order is permitted upon a showing that there has been a change in circumstances such that modification is necessary to ensure the continued best interests of the child (FCA 467, 652; *Demille v Pizzo*, 129 AD3d 957 [2d Dept 2015], *lv denied* 26 NY3d 905 [2015]).

In determining whether relocation is appropriate, each "request must be considered on its own merits with due consideration of all the relevant facts and circumstances and with predominant emphasis being placed on what outcome is most likely to serve the best interests of the child" (*Matter of Tropea v Tropea,* 87 NY2d 727, 739 [1996]). Relevant factors include the impact of the move on the relationship between the child and the noncustodial parent, economic necessity or a specific health-related concern justifying a proposed move, the demands of a second marriage and the custodial parent's opportunity to improve his or her economic situation, the good faith of the parents in requesting or opposing the move, the child's respective attachments to the custodial and noncustodial parent, the possibility of devising a visitation schedule that will enable the noncustodial parent to maintain a meaningful parent-child relationship, the quality of the lifestyle that the child would have if the proposed move were permitted or denied, the negative impact, if any, from continued or exacerbated hostility between the custodial and noncustodial parents, and the effect that the move may have on any extended family relationships (*Id.* at 739-740).

F. Native American child.

A child custody proceeding that pertains to a Native American child is not subject to the UCCJEA to the extent that it is governed by the Indian Child Welfare Act (25 USCA §§ 1901 et seq.). A Native American child is any unmarried person who is under age 18 and is either a member of a Native American tribe or is eligible for membership in a Native American tribe and is the biological child of a member of a Native American tribe (25 U.S.C.A. § 1903 [4]). A Native

American child’s tribe means the tribe in which a Native American child is a member or eligible for membership or if a Native American child is a member of or eligible for membership in more than one tribe, the Native American tribe with which the Native American child has the more significant contacts (*Id.* at [5]).

A Native American tribe has exclusive jurisdiction over any child custody proceeding involving a Native American child who resides or is domiciled within the reservation of such tribe. New York must give full faith and credit to the judicial proceedings of any Native American tribe applicable to Native American child custody proceedings (25 USC § 1911).

In any State court proceeding for the foster care placement of, or termination of parental rights to, a Native American child not domiciled or residing within the reservation of the Native American child’s tribe, the court, in the absence of good cause to the contrary, must transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Native American custodian or the Native American child’s tribe (*Id.*).

PROFESSIONAL RESPONSIBILITY

The New York Rules of Professional Conduct (RPC) were adopted by all four Departments of the Appellate Division of the New York State Supreme Court in 2009 and are published at 22 NYCRR Part 1200. Although the RPC are based on the ABA Model Rules of Professional Conduct (the "Model Rules"), the RPC include many additions and variations, as noted below. Interpretive, non-binding resources regarding the RPC include the New York State Bar Association Comments (comments and suggestions about how the RPC should be interpreted [*See* www.nysba.org]) and ethics opinions issued by the New York State Bar Association (*See* www.nysba.org), the New York County Lawyer's Association (*See* www.nycla.org), and the Association of the Bar of the City of New York (*See* www.nycbar.org).

Other statutes and court rules governing attorney conduct include: New York Judiciary Law, art. 15; additional Rules of the Supreme Court, Appellate Division, All Departments (22 NYCRR Parts 1205, 1210, 1215, 1220 1300, 1400, 1500); and Rules of the Chief Administrator of the Courts (22 NYCRR Parts 118, 130, 137). The Commercial and Federal Litigation Section of the New York State Bar Association has also issued "Social Media Ethics Guidelines" to address the evolving interplay of social media communications and the RPC, particularly in the areas of attorney advertising, furnishing legal advice, use of evidence, communications with clients, and the researching of social media profiles of prospective or sitting jurors (*See* https://nysba.org/NYSBA/Sections/Commercial%20Federal%20Litigation/ComFed%20Display%20Tabs/Reports/NYSBA-Social%20Media%20Ethics%20Guidelines-Final-6-20-19.pdf).

Members of the legal profession are also subject to the New York State Standards of Civility (*See* 22 NYCRR 1200, Appendix A). The civility standards are a "set of guidelines intended to encourage lawyers, judges and court personnel to observe principles of civility and decorum" (*Id.;* Preamble). These guidelines outline a lawyer's duty to other lawyers, litigants, witnesses, the court and its personnel.

I. The Lawyer-Client Relationship

A. Competence: RPC rule 1.1

In addition to generally requiring a lawyer to provide competent representation to a client, the RPC expressly provide that:

- A lawyer shall not handle a matter the lawyer knows or should know that the lawyer is not competent to handle, without associating with a lawyer who is competent to handle it (RPC rule 1.1 [b]), and
- A lawyer should not intentionally (a) fail to seek the objectives of a client through reasonably available means permitted by law and the RPC, or (b) prejudice or damage the client during the course of the representation except as permitted by the RPC (RPC rule 1.1 [c]).

B. Scope of representation and allocation of authority between client and lawyer: RPC rule 1.2 (e) - (g)

RPC rule 1.2 includes the following additional provisions:

- A lawyer may exercise professional judgment to waive or fail to assert a client's right or position, and may accede to reasonable requests of opposing counsel (e.g., scheduling matters, continuances or other small favors) as long as a client's rights are not prejudiced (RPC rule 1.2 [e]).
- A lawyer may refuse to participate in conduct the lawyer believes to be unlawful, even though there is some support for an argument that the conduct is legal (RPC rule 1.2 [f]).
- A lawyer does not violate the RPC by avoiding offensive tactics and by treating all persons involved in the legal process with courtesy and consideration (RPC rule 1.2 [g]). While a lawyer must abide by a client's decisions on objectives, a lawyer is not obligated to play "hardball."

C. Diligence: RPC rule 1.3

In addition to requiring that a lawyer act with reasonable diligence and promptness in representing a client, the RPC expressly provide that:

- A lawyer shall not neglect a legal matter entrusted to the lawyer (RPC rule 1.3 [b]).
- A lawyer shall not intentionally fail to carry out a contract of employment entered into with a client for professional services, but may withdraw as permitted by the RPC (RPC rule 1.3 [c]).

D. Communication with client: RPC rule 1.4

During the course of representation, a lawyer is responsible for communicating with the client in accordance with the RPC. Under RPC rule 1.4 the lawyer's communication responsibilities include, among others:

- Promptly informing the client of material developments (including settlement or plea offers), decisions or circumstances which require the client's informed consent, and any other information required to be communicated to a client by court rule or other law (RPC rule 1.4 [a] [1]);
- Reasonably consulting with the client about the means by which the client's objectives are to be accomplished (RPC rule 1.4(a)(2);
- Keeping the client reasonably informed about the status of the matter (RPC rule 1.4(a)(3);
- Promptly complying with a client's reasonable requests for information (RPC rule 1.4(a)(4); and
- Explaining a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation (RPC rule 1.4(b)).

E. Declining or terminating representation: RPC rule 1.16

The RPC expressly provide that a lawyer shall not accept employment on behalf of a person if the lawyer knows or reasonably should know that the person wishes to:

- Bring a legal action, conduct a defense, assert a position, or have other steps taken, merely to harass or maliciously injure any person, or
- Present a claim or defense that is not warranted under existing law, unless it can be supported by a good faith argument for an extension, modification, or reversal of existing law

(RPC rule 1.16 [a]).

The RPC add to the reasons requiring a lawyer to withdraw from representation of a client that the lawyer knows or reasonably should know that the client is bringing the action, conducting the defense, asserting a petition, or having other steps taken merely for the purpose of harassing or maliciously injuring any person (RPC rule 1.16 [b] [4]).

The RPC exclude from the reasons permitting a lawyer to withdraw from a representation that the representation will result in an unreasonable financial burden on the lawyer (*Cf.* Model Rules rule 1.16 [b] [6]). Added to the reasons permitting withdrawal are, among others:

- The client insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law (RPC rule 1.16 [c] [6]);
- The client fails to cooperate in the representation or otherwise renders the representation unreasonably difficult for the lawyer to carry out employment effectively (RPC rule 1.16 [c] [7]);
- The lawyer's inability to work with co-counsel indicates that the best interest of the client likely will be served by withdrawal (RPC rule 1.16 [c] [8]);
- The lawyer's mental or physical condition renders it difficult for the lawyer to carry out the representation effectively (RPC rule 1.16 [c] [9]); and
- The client knowingly and freely assents to termination of the employment (RPC rule 1.16 [c] [10]).

II. Confidentiality

A. Professional obligation of confidentiality: RPC rules 1.6 (a)

The RPC expressly define confidential information as information from any source gained during or relating to the representation that is protected by the attorney-client privilege (*See* Evidence, IV.B.), that is likely to be embarrassing or detrimental to a client if disclosed, or that the client has requested be kept confidential. Confidential information does not include the lawyer's legal knowledge or legal research or information that is generally known in the local community or in the trade, field or profession to which the information relates.

A lawyer may not knowingly reveal confidential information or use such information to harm the client, help the lawyer or help a third person. Disclosure of confidential information is permitted if the client consents, or if disclosure is impliedly authorized to advance the best interest of the client and is either reasonable under the circumstances or is customary in the professional community.

B. Exceptions to confidentiality: RPC rule 1.6 (b)

A lawyer may disclose confidential information when permitted or required under the RPC or to comply with other law or court order (RPC rule 1.6 [b] [6]). The RPC permits disclosure to prevent reasonably certain death or substantial bodily harm, to prevent the client from committing any crime, to withdraw an opinion based on false information that is being relied upon by a third person or is being used to further a crime or fraud, to secure legal advice about compliance with the RPC or other law, to defend against an accusation of wrongful conduct, or to collect a fee (RPC rule 1.6 [b] [1]-[5]).

III. Conflicts of Interest

A. Current clients: RPC rules 1.7, 1.0 (f)

Concurrent conflicts of interest may arise from a lawyer's responsibilities to another client, a former client or a third person or from the lawyer's own interests. A lawyer cannot represent a person or entity if a reasonable lawyer would conclude that the representation will involve the lawyer in representing differing interests (RPC rule 1.7 [a] [1]). Differing interests are expressly defined to include any interest that will adversely affect either the judgment or loyalty of the lawyer to the client, whether it be a conflicting, inconsistent, diverse, or other interest (RPC rule 1.0 [f]). Also, a lawyer cannot represent a person or entity if a reasonable lawyer would conclude that there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests (RPC rule 1.7 [a] [2]).

Notwithstanding the existence of a current conflict of interest, a lawyer may represent a client if the lawyer reasonably believes that the lawyer can provide competent representation, the representation is not prohibited by law and does not involve a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal, and both affected clients give informed consent, confirmed in writing (RPC rule 1.7 [b]).

B. Former clients: RPC rule 1.9

A lawyer who has formerly represented a client in a matter may not represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interest of the former client, unless the former client gives informed consent, confirmed in writing. The same rule applies if a law firm with which the lawyer formerly was associated had previously represented a client whose interests are materially adverse to the person the lawyer now seeks to represent and about whom the lawyer had acquired material confidential information.

C. Sexual relations with clients: RPC rule 1.8 (j)

Sexual relations with clients during the course of representation are not flatly prohibited, except in domestic relations matters, but are inadvisable and may lead to impairment of the lawyer's exercise of professional judgment, a conflict of interest, and breach of his or her fiduciary duties. A lawyer must not require or demand sexual relations with any person as a condition of entering into or continuing a professional relationship, or employ coercion, intimidation or undue influence in entering into sexual relations during the course of the professional representation. In domestic relations matters, a lawyer may not enter into sexual relations with a client during the course of representation. Rule 1.8 (j) does not apply to ongoing consensual sexual relations that pre-date the initiation of the lawyer-client relationship.

D. Imputed disqualification: RPC rule 1.10

While lawyers are in the same firm, none of them may knowingly represent a client when any of them practicing alone would be prohibited from doing so under RPC rule 1.7, 1.8 or 1.9 (RPC rule 1.10 [a]). When a lawyer leaves a firm, the former firm may not represent a person with interests that the firm knows or reasonably should know are materially adverse to a client represented by the formerly associated lawyer and not currently represented by the firm if anyone remaining at the firm has confidential information material to the matter (RPC rule 1.10 [b]). When a lawyer joins a new firm, the new firm cannot knowingly represent a client in a matter that is substantially related to or the same as a matter that was being handled by the lawyer or the lawyer's former firm if the interests of the former client are materially adverse to those of the new firm's client, unless the lawyer had not acquired confidential information material to the matter being handled by the new firm (RPC rule 1.10 [c]). These disqualifications may be waived by the affected client and/or former client if the lawyer determines representation is not prohibited under the conflict of interest rules involving current clients (*See* Professional Responsibility, III.A) and both affected clients give informed consent, confirmed in writing (RPC rule 1.10 [d]). A firm must keep detailed records of its client base and maintain and use a system for checking those records to avoid any potential conflicts in representation (RPC rule 1.10 [e], [f]).

A lawyer related to another lawyer as parent, child, sibling or spouse may not knowingly represent a client whose interests differ from a party represented by the related lawyer in the same matter, unless that client consents after full disclosure and the lawyer concludes that the lawyer can adequately represent the client (RPC rule1.10 [h]). Although this conflict of interest provision is found in the rule regarding imputation, such a conflict is not imputed to other lawyers in a firm (NY St Bar Assn Comm on Prof Ethics Op 895 [2011]). The consent should be in writing (*Id.*).

E. Organization as client: RPC rule 1.13 (a), (b)

When a lawyer representing an organization is dealing with its constituents (i.e., officers, directors, employees and other constituents) and it appears that the interests of the organization and any of its constituents differ, the lawyer must make clear that the lawyer represents the organization and not any of the constituents (RPC rule 1.13 [a]).

If the lawyer knows that a constituent is acting, or intends to act or refuses to act, in a manner that (a) either violates a legal obligation to the organization or violates a law (which violation may be imputed to the organization) and (b) is likely to result in substantial injury to the organization, the lawyer must proceed as is reasonably necessary in the best interests of the organization. Relevant considerations for the lawyer in determining how to proceed include the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, and the organization's policies concerning such matters. Any measure taken by the lawyer must be designed to minimize disruption to the organization and the risk of revealing information relating to the organization to persons outside of it. Such measures may include (1) asking the constituent to reconsider the matter, (2) advising that a separate legal opinion be sought for presentation to an appropriate authority in the organization, and (3) referring the matter to higher authority in the organization, including if appropriate the highest authority that can act in behalf of the organization (RPC rule 1.13 [b]).

If that highest authority in the organization insists upon action, or a refusal to act, clearly in violation of law and likely to result in substantial injury to the organization, the lawyer may resign in accordance with Rule 1.16 (*See* Professional Responsibility, I.E.), and may also reveal confidential information if any of the exceptions to Rule 1.6 apply (*See* Professional Responsibility, II.B.).

IV. Client's Rights, Retainer Agreements and Fees

A. Statement of client's rights, engagement letters and retainer agreements: 22 NYCRR Parts 1210, 1215

Every lawyer must post in the lawyer's office, in a manner visible to clients, a statement of client's rights in the form set forth in 22 NYCRR 1210.1. This statement explains in some detail the rights and obligations involved in an attorney/client relationship, including the right of the client to competent and courteous representation by the lawyer, the right to be charged reasonable fees and have them explained before or within a reasonable time of engagement, the right to be informed at the outset how the fee will be computed and the manner of billing, the right to be kept informed of the status of the matter and have questions answered promptly, and the right not to be refused representation on the basis of race, creed, color, religion, sex, sexual orientation, gender identity, gender expression, age, national origin, or disability.

Every lawyer who charges a fee for representation must provide the client with a written letter of engagement that contains an explanation of the scope of the legal services to be provided, the attorney's fees to be charged, the expenses and billing practices, and the right to arbitrate fee disputes (22 NYCRR 1215.1 [a], [b]). This letter may take the form of a retainer agreement (22 NYCRR 1215.1 [c]). It must be provided before commencing the representation or within a reasonable time thereafter if otherwise impracticable or if the scope of the services cannot be determined when the representation commences (22 NYCRR 1215.1 [a]). Whenever there is a significant change in the scope of services or the fee to be charged, an updated letter must be provided (*Id.)* The requirements of 22 NYCRR 1215.1 do not apply if the expected fee is under $3,000, where the services are the same as others previously rendered to and paid for by the client, in any domestic relations matter for which a retainer agreement is required by 22 NYCRR Part

1400, where the attorney is admitted in another jurisdiction and has no office in New York, or where no material portion of the services are to be rendered in New York (22 NYCRR 1215.2).

B. Domestic relations matters: 22 NYCRR 1400, RPC rule 1.5

In any domestic relations matter (i.e., divorce, separation, annulment, custody, visitation, maintenance, or child support), a more detailed statement of client's rights and a retainer agreement are required (22 NYCRR 1400.1, 1400.2, 1400.3; RPC rule 1.5 [e]). The client must be shown the statement of rights at the initial conference and prior to executing a retainer agreement, and the client must sign an acknowledgment that the client has received the statement of rights (22 NYCRR 1400.2). The statement of rights, among other provisions, must advise the domestic relations client of the right to receive a written itemized bill from the attorney at least every 60 days and the risk of fines or sanctions and/or responsibility for additional legal fees if the client engages in conduct found to be frivolous or meant to intentionally delay the case.

In domestic relations matters, the payment of a fee cannot be contingent upon the securing of a divorce, obtaining custody or visitation or in any way determined by reference to maintenance, support or equitable distribution (RPC rule 1.5 [d] [5]). Lawyers in domestic relations matters are not permitted to charge a contingency fee (RPC rule 1.5 [d] [5] [i]) or collect a nonrefundable retainer fee, but they may enter into a minimum fee arrangement that provides in plain language for the payment of a specific amount below which the fee will not fall based upon the handling of the case to its conclusion (22 NYCRR 1400.4; RPC rule 1.5 [d] [4]). Lawyers may not obtain a confession of judgment or promissory note, take a lien on real property or otherwise obtain a security interest from the client to secure payment of the lawyer's fee, unless the retainer agreement so provides, an application is made to the court, notice of application has been given to the client's spouse, and the court grants approval (22 NYCRR 1400.5 [a]; RPC rule 1.5 [d] [5] [iii]). In no event may a lawyer foreclose on a mortgage placed on the marital residence while the spouse who consents to the mortgage remains the titleholder and the residence remains the spouse's primary residence (22 NYCRR 1400.5 [b]; RPC rule 1.5 [d] [5] [iii]).

C. Compromise of infant claims: CPLR 1207, 1208; 22 NYCRR 603.26 (Appellate Division, First Department); 22 NYCRR 619.19 (Appellate Division, Second Department); 22 NYCRR 1015.4 (Appellate Division, Fourth Department)

Court approval must be obtained for a settlement of claim or cause of action belonging to an infant (*See* CPLR 1207, 1208). The rules of three of the four Departments of the Appellate Division expressly provide that any sum collected by an attorney on behalf of an infant must be deposited in a special account apart from the attorney's personal account, and a statement of the amount received must be delivered (or sent by certified mail) to the infant's guardian. Payments from the special account may be made only pursuant to court order.

D. Prohibited fees: RPC rule 1.5 (a), (d)

A lawyer cannot make an agreement for, charge or collect an excessive or illegal fee or expense. The factors for determining whether a fee is excessive are the same as those set forth in the Model Rules for determining whether a fee is "unreasonable," but the RPC add, "A fee is excessive when, after a review of the facts, a reasonable lawyer would be left with a definite and firm conviction that the fee is excessive" (RPC rule 1.5 [a]).

A lawyer cannot make an agreement for, charge, or collect a contingent fee in a criminal matter, a fee prohibited by law or court rule, a fee based on fraudulent billing, or a nonrefundable retainer fee (RPC rule 1.5 [d] [1] - [4]). A lawyer may charge a reasonable minimum fee if the retainer agreement containing a minimum fee clause defines in plain language and sets forth the circumstances under which the fee may be incurred and how it will be calculated (RPC rule 1.5 [d] [4]).

E. Fee disputes: RPC rule 1.5 (f); 22 NYCRR Part 137

Generally, fee disputes between clients and lawyers, where the amount in question is between $1,000 and $50,000, may be resolved by arbitration and mediation pursuant to the detailed procedure set forth in Part 137 of Title 22 of the NYCRR. Arbitration of fee disputes is mandatory if the client requests it (22 NYCRR 137.2 [a]). The determination of the arbitration panel is final and binding, except that either party may request de novo review by the courts (*Id.*).

Mandatory arbitration of fee disputes does not apply to representation in criminal matters, to disputes below $1,000 or above $50,000 unless both parties consent, to claims requesting relief other than the adjustment of fees, to claims involving substantial legal questions (including professional malpractice or misconduct), to claims where the attorney's fees are set by statute, rule or court order, where no services have been rendered by the attorney for more than two years, where the dispute involves an attorney not admitted to practice in New York and having no New York office, where no material service was rendered in New York, and where the request for arbitration is not made by the client or the client's legal representative (22 NYCRR 137.1 [b]).

V. Safeguarding Property and Funds of Clients and Others

A. Prohibition against commingling and misappropriation: RPC rule 1.15 (a)

A lawyer in possession of any funds or other property belonging to another person in connection with the lawyer's practice of law is a fiduciary and must not misappropriate or commingle such funds with the lawyer's own funds.

B. Separate accounts: RPC rule 1.15 (b), (e), (h); Judiciary Law § 497; 22 NYCRR Part 1300

A lawyer in possession of funds belonging to another person incident to the lawyer's practice of law must maintain those funds in a special bank account separate from any of the lawyer's (or the law firm's) business, personal or fiduciary accounts (e.g., accounts held as executor, guardian, trustee or receiver) (RPC rule 1.15 [b] [1]). The account title, the checks, and the deposit slips must all include language identifying it as an "Attorney Special Account," "Attorney Escrow Account," or "Attorney Trust Account" (RPC rule 1.15 [b] [2]). The bank must agree to provide dishonored check and overdraft reports to the Lawyer's Fund for Client Protection (RPC rule 1.15 [b] [1], 22 NYCRR 1300.1). An attorney trust account should never be overdrawn and should not carry overdraft protection (RPC rule 1.15 [b] [1]; 22 NYCRR Part 1300). Funds belonging in part to the lawyer and in part to the client or a third person must be kept in such an account, but the lawyer may withdraw the part belonging to the lawyer unless the client or the third person disputes the lawyer's right to the funds, in which case the dispute must first be resolved (RPC rule 1.15 [b] [4]).

The attorney has the discretion to determine whether such funds must be deposited in non-interest, or in interest-bearing accounts (Judiciary Law § 497, 21 NYCRR 7000.8). If in the attorney's judgment the funds are too small in amount, or likely to be held too short a time to generate sufficient interest to justify a separate account for the benefit of the beneficial owner, the funds must be deposited in an "interest on lawyer account" (IOLA), designated as "[name of attorney/law firm] IOLA account" (*Id.*). State Finance Law § 97-v establishes a state IOLA fund that receives the interest on IOLA accounts for distribution to not-for-profit tax-exempt entities for the purpose of delivering civil legal services to the poor and for other specified purposes related to the improvement of the administration of justice.

Only a lawyer admitted in New York may be an authorized signatory of a trust account (RPC rule 1.15 [e]). All trust account withdrawals must be made only to a named payee and not to cash and must be made by check, or with the prior written approval of the party entitled to the proceeds, by wire transfer (*Id.*). If a firm dissolves, the former members must make appropriate arrangements to maintain these records (RPC rule 1.15 [h]).

C. Advance payment of fees

Unlike the rule in most states requiring any advance payment of fees to be deposited into a trust account and withdrawn by the attorneys only as fees are earned or expenses incurred, in New York there are two options for handling such advance payments. Under one option the parties may agree to treat the payment as client funds, in which case the lawyer must deposit the payment into a trust account and may not retain any interest earned on the funds. The other option is for the parties to agree to treat the payment as the lawyer's own funds, in which case the lawyer may use the money as the lawyer chooses, except that the lawyer cannot deposit the money into a trust account, because doing so would constitute an improper comingling of client and lawyer funds (NY St Bar Assn Comm on Prof Ethics Ops 953 [2013], 816 [2007]).

D. Notifying of receipt of property; safekeeping: RPC rule 1.15 (c)

A lawyer must promptly notify a client or third party of the receipt of funds, securities or other properties in which the client or third party has an interest, safeguard them, maintain complete records of them, and promptly pay or deliver to the client or third party as requested by the client or third person such funds, securities or other properties that the client or third party is entitled to receive.

E. Bookkeeping: RPC rule 1.15 (d), (i) (j)

A lawyer must maintain and keep for seven years after the events that they record detailed records of all deposits, withdrawals and disbursements of funds that concern the lawyer's practice of law and copies of all retainer agreements, statements and bills rendered to clients, records showing payments to persons not in the lawyer's regular employ for services rendered, and retainer and closing statements filed with the Office of Court Administration.

VI. Communication about Legal Services

A. Advertising: RPC rule 7.1

Advertising by lawyers is broadly permitted as long as it is truthful and not deceptive or misleading. RPC rule 7.1 contains extensive provisions regarding what may or may not be included in attorney advertising and its dissemination and retention and should be carefully reviewed whenever a lawyer is preparing any advertising to be published, broadcast or placed on the internet.

An advertisement may include testimonials from current or past clients and statements reasonably likely to create an expectation about results, comparing the lawyer's services with the services of other lawyers, and describing the quality of the lawyer's services, provided such testimonials and statements are not false, deceptive or misleading and can be factually supported by the lawyer as of the date on which the advertisement is published or disseminated and the advertisement contains the disclaimer: "Prior results do not guarantee a similar outcome." A testimonial from a client with respect to a matter still pending may only be used if the client gives informed consent confirmed in writing. Paid endorsements may be used as long as the fact of payment is disclosed. Actors and depictions of fictionalized events or scenes may be used as long as the same is disclosed.

All advertising must be labeled "attorney advertising" and must include the name, principal law office address and telephone number of the lawyer or law firm. Fees set forth in advertising must be honored generally for not less than 30 days after publication of the advertisement but in some cases for not less than 90 days.

B. Referrals: RPC rule 7.2

Lawyers may not compensate any person or organization to recommend clients, but they may accept referrals from legal service organizations, bar associations and other non-profit organizations and can enter into arrangements with other lawyers to refer clients to each other.

C. Solicitation: RPC rules 7.3, 4.5

A lawyer may not solicit clients by in-person, telephone, or real-time or interactive computer-accessed communication unless the recipient is a close friend, relative or former or existing client (RPC rule 7.3 [a] [1]).

Other types of targeted communications to solicit clients are permitted, e.g., mailings, but must be filed with the appropriate attorney disciplinary committee (except for web sites and professional cards or announcements) (RPC rule 7.3 [c]).

No solicitation relating to a specific incident involving potential claims for personal injury or wrongful death may be disseminated before the 30th day after the date of the incident (RPC rules 9.3 [e], 4.5 [b]).

D. Specialty: Rule 7.4

A lawyer or law firm may identify areas of law in which the lawyer or firm practices and may state that its practice is limited to one or more areas of law, but may not state that the lawyer or law firm is a specialist or specialized in a particular field of law, except:

- A lawyer admitted to practice before the United States Patent and Trademark Office may use "Patent Attorney" or a similar designation.
- If the lawyer is certified as a specialist in a particular area of law by a private organization approved by the American Bar Association, the lawyer may state the fact of such certification, provided the certifying organization is identified and it is prominently stated: "This certification is not granted by any governmental authority."
- If the lawyer is certified a specialist in a particular area of law by an authority having jurisdiction over specialization in another state, the lawyer may state the fact of such certification, provided the certifying state is identified and it is prominently stated: "This certification is not granted by any governmental authority within the State of New York."

To be prominently made, the required statements must be written legibly in a font at least two sizes larger than the text used to state a written certification or spoken intelligibly at a cadence and volume no lower than used to state a spoken certification.

E. Professional notices, letterheads and signs: RPC rule 7.5

Lawyers may use internet web sites, professional cards, professional announcement cards, office signs, letterheads or similar professional notices provided they do not violate any statute or court rule. Lawyers may not practice under a false, deceptive, or misleading trade name or domain name, a name that is misleading as to the identity of the lawyer, or a firm name containing the names of nonlawyers. Telephone numbers with trade names, domain names, or monikers are permitted provided they do not otherwise violate the RPC. Lawyers may not hold themselves out as having a partnership with one or more other lawyers unless they are in fact partners.

VII. Communication with Represented Persons: RPC rule 4.2

In representing a client, a lawyer may not communicate, or cause another to communicate, with a party that the lawyer knows is represented by another lawyer in the matter without the prior consent of that other lawyer. But the lawyer may cause the client to communicate with a represented person, and may counsel the client with respect to those communications, provided advance notice is given to the represented person's counsel.

VIII. Litigation

A. Non-meritorious claims and contentions: RPC rule 3.1; 22 NYCRR Part 130; CPLR 8303-a

A lawyer may not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous. Nevertheless, a lawyer for a party in a criminal or other proceeding that could result in incarceration may defend the proceeding so as to require that any element of the case be established (RPC rule 3.1 [a]).

A lawyer's conduct is frivolous if:

- The lawyer knowingly advances a claim or defense that is unwarranted under existing law (except good faith arguments to modify the law),
- The conduct has no reasonable purpose other than to delay or prolong the resolution of the litigation or to harass or maliciously injure another, or
- The lawyer knowingly asserts material factual statements that are false

(RPC rule 3.1 [b]).

Every paper served on another party or submitted to the court must be signed by the lawyer, and that signature constitutes a certification by the lawyer that the paper or contentions therein are not frivolous (22 NYCRR 130-1.1-a). A lawyer whose conduct is found to be frivolous is subject to the imposition of costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, as well as the imposition of sanctions not to exceed $10,000 (22 NYCRR Subpart 130-1). In personal injury, property damage and wrongful death cases, the penalty is limited to costs and attorney's fees not to exceed $10,000 (CPLR 8303-a). Costs and sanctions up to $2,500 may also be imposed in both civil and criminal cases for a lawyer's failure, without good cause, to appear in court at the scheduled time and place (22 NYCRR Subpart 130-2).

B. Delay of litigation: RPC rule 3.2

A lawyer may not use means that have no substantial purpose other than to delay or prolong the proceeding or cause needless expense.

C. Fairness to opposing party and counsel: RPC rule 3.4

Fair competition in the adversary system prohibits a lawyer from the following conduct:

- Suppressing evidence that the lawyer is legally obligated to produce,
- Advising or causing a person to hide or leave the jurisdiction of a tribunal for purposes of making the person unavailable as a witness,
- Knowingly creating, preserving or using perjured testimony or false evidence,
- Disregarding rulings of a tribunal, except in good faith to test the validity of such ruling,

- Presenting or threatening to present criminal charges solely to obtain an advantage in a civil matter.

In appearing before a tribunal on behalf of a client, a lawyer may not:

- Make any statement or allusion that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence,
- Assert personal knowledge of facts in issue except when testifying as a witness,
- Assert a personal opinion as to the justness of a cause, the credibility of a witness, or the culpability, guilt or innocence of a party, except when making an argument based upon analysis of the evidence,
- Ask any question that the lawyer has no reasonable basis to believe is relevant and that is intended to degrade a witness or other person.

A lawyer may not pay, offer to pay, or acquiesce in the payment of a witness contingent on the content of the witness's testimony or the outcome of the matter. However, a lawyer may pay reasonable compensation to a witness for loss of time and reasonable related expenses incurred in testifying and may pay a reasonable fee and expenses for the professional services of an expert.

IX. Regulation and Responsibilities of the Legal Profession

A. Registration of attorneys: Judiciary Law § 468-a; 22 NYCRR Part 118

An applicant for admission to practice law in New York must register by completing a registration form and paying the $375 biennial fee. The initial attorney registration and fee payment must be completed online at: https://iapps.courts.state.ny.us/aronline/BoleSearch. Instructions regarding registration will be provided to applicants at the time they are certified by the State Board of Law Examiners to the Appellate Division pursuant to § 520.7 of the Rules of the Court of Appeals.

All lawyers must file a registration statement with the Office of Court Administration every two years. Lawyers who are not retired from the practice of law must pay a registration fee (currently $375) with each filing. These statements are available for public inspection (except for dates of birth, home addresses, social security numbers and race, gender, gender identity, sexual orientation, ethnicity, and employment categories[13]). A lawyer must certify in the registration statement that the lawyer is in full compliance with (1) continuing legal education requirements (including the retention of certificates of attendance), (2) the reporting of pro bono services and contributions, and (3) any outstanding child support obligations. An amended statement must be filed within 30 days of any change in the lawyer's contact information.

B. Continuing legal education: 22 NYCRR Part 1500

1. Newly admitted lawyers (initial two years of admittance)

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[13] Providing these categories is optional (22 NYCRR 118.1 [e] [12]).

Every newly admitted lawyer must complete a minimum of 32 hours of accredited transitional education within the first two years of admission to the bar. Each year must include 16 hours, consisting of 3 hours of ethics and professionalism, 6 hours of skills, and 7 hours of practice management and areas of professional practice. These hours must consist of formal courses and programs with participatory formats (i.e., traditional live classroom setting or fully interactive conferencing) that are approved by the Continuing Legal Education Board (CLE Board); non-participatory formats are permitted in the area of law practice management and areas of professional practice, or by permission of the CLE Board.

2. Other than newly admitted lawyers (after two years of admittance)

Every lawyer other than a newly admitted lawyer must complete a minimum of 24 credit hours of continuing legal education, accredited by the CLE Board, every two years, including at least 4 credit hours in ethics and professionalism and at least 1 credit hour in diversity, inclusion and elimination of bias. Credit hours may be earned in non-traditional formats (CD's, self-study, on-line, etc.) as well as formal courses, and credit also may be earned for speaking and teaching activities, attending law school courses, judging law school competitions, legal writing, and performing pro bono legal services.

C. Misconduct and discipline generally: Judiciary Law 90; RPC rule 8.4

A lawyer may not violate or attempt to violate any of the Rules of Professional Conduct, nor engage in any conduct involving dishonesty, fraud, deceit or misrepresentation, or conduct that is prejudicial to the administration of justice or that adversely reflects on the lawyer's fitness as a lawyer. A lawyer may not state or imply an ability to influence improperly or upon irrelevant grounds any tribunal, legislative body or public official or to achieve results by means that violate the RPC or any law. Nor may a lawyer unlawfully discriminate or commit harassment in the practice of law, including in hiring, promoting or otherwise determining conditions of employment on the basis of age, race, creed, color, national origin, sex, disability, marital status, sexual orientation, gender identity, gender expression, ethnicity, pregnancy, religion, or military/veteran status. Any violation may be reported to the attorney disciplinary committee of the appropriate Appellate Division Department and may result in censure, suspension or disbarment.

D. Unauthorized practice of law: RPC rule 5.5

A lawyer may not practice law in a jurisdiction where the lawyer is not licensed in violation of the regulations of the legal profession in that jurisdiction. Nor may a lawyer aid a non-lawyer in the unauthorized practice of law.

E. Non-legal services and cooperative business arrangements: RPC rules 5.7, 5.8; 22 NYCRR Part 1205

These rules are much more detailed than the provisions of Model Rule 5.7 and should be carefully reviewed by any lawyer providing non-legal services to a client, whether individually or by a contractual relationship with a non-legal professional or firm. A lawyer who provides a person with non-legal services that are not distinct from legal services being provided to that person is subject to the RPC for both the legal and non-legal services (RPC rule 5.7 [a] [1]). Even if the non-legal services are distinct from the legal services, the non-legal services still would be subject to the RPC if the person receiving the services could reasonably believe that the non-legal services are the subject of a lawyer-client relationship (RPC rule 5.7 [a], [2], [3]), and such a belief will be presumed unless the person has been advised in writing that the services are not legal services and that the protection of a client-lawyer relationship does not exist with respect to them (RPC rule 5.7 [a] [4]).

Lawyers and law firms may not, however, offer non-legal services through non-lawyers as part of the services of the lawyer or law firm, but they may enter into contractual relationships (cooperative business arrangements) with non-legal professionals or firms to provide non-legal services for clients if the profession is included in a list established in the Joint Appellate Division Rules (RPC rule 5.8). The list currently includes architecture, certified public accountancy, professional engineering, land surveying, and certified social work (22 NYCRR 1205.5). The client must give informed written consent to the contractual relationship and be provided with a "Statement of Client's Rights in Cooperative Business Arrangements" (RPC rule 5.8 [a], [3]; 22 NYCRR 1205.4).

In all cases, the lawyer shall not permit any nonlawyer to direct or regulate the professional judgment of the lawyer or cause the lawyer to compromise the lawyer's duties regarding confidential information (RPC rules 5.7 [b], 5.8 [a]).

F. Pro bono services: RPC rules 6.1, 6.5

Every lawyer should aspire to provide at least 50 hours of qualifying pro bono legal services each year to poor persons, and to annually contribute financially to organizations that provide legal services to poor persons in an amount at least equivalent to the amount typically billed by the lawyer for one hour of time. Pro bono legal services include:

- Professional legal services to persons who are financially unable to compensate counsel,
- Activities related to improving the administration of justice by simplifying the legal process for, or increasing the availability and quality of legal services to, poor persons, and
- Professional services to charitable, religious, civic, and educational organizations in matters designed predominantly to address the needs of poor persons.

Appropriate organizations for financial contributions are organizations primarily or substantially engaged in the provision of legal services to the poor.

Attorneys are encouraged to satisfy some of their pro bono requirement by participation in various volunteer programs designed to increase access to and improve the delivery of justice to low-income residents of New York, including the Volunteer Attorney Programs in New York City and the Court Help Centers in New York City and some upstate counties. These programs are established by The New York State Courts Access to Justice Program working closely on access to justice issues with the Permanent Commission on Access to Justice established in 2015.

The Volunteer Attorney Programs recruit, train and supervise volunteer attorneys so they can provide limited scope representation to litigants in family, divorce, consumer credit, and landlord-tenant cases. The programs provide free continuing legal education training credits to volunteer attorneys in exchange for their volunteer hours (*See* NYS Courts Access to Justice Program Volunteer Attorney Program at http://ww2.nycourts.gov/attorneys/volunteer/VAP/program_descriptions.shtml.

The Court Help Centers are located in the courthouse and operate on a first-come, first-served basis to any unrepresented litigant, regardless of income. The Court Help Centers (*See* http://nycourts.gov/courthelp//GoingToCourt/helpCenters.shtml) are staffed by a combination of volunteer attorneys, court attorneys and court clerks and provide free comprehensive procedural and legal information on Supreme Court special proceedings (e.g., Article 78), matrimonial/family matters and real property/housing matters, and provide other civil assistance.

A lawyer who, under the auspices of programs sponsored by a court, bar association, government agency or not-for-profit legal services organization, provides short-term legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter (such as legal advice hotlines, advice-only clinics and pro se counseling programs), is subject to the requirements of the provisions of the RPC governing conflicts of interest only if the lawyer has actual knowledge at the time of commencement of representation that the representation of the client involves a conflict of interest. The lawyer providing such services must secure the client's informed consent to the limited scope of the representation and is subject to the rules regarding confidentiality.

G. Pro bono requirement for bar admission: 22 NYCRR 520.16

Applicants seeking admission to the bar, including foreign-educated candidates, must complete 50 hours of qualifying pro bono legal services prior to seeking admission. The services must be law-related and assist in the provision of legal services for persons of limited means, not-for-profit organizations, or other individuals, groups and organizations seeking to secure or promote access to justice, or assist in the provision of legal services in public service for various governmental entities. All pre-admission pro bono work must be supervised by persons designated in the rule, and proof of completion must be filed with the application for admission to practice in the Appellate Division where admission is sought.

H. Pro Bono Scholars Program: 22 NYCRR 520.17

The Pro Bono Scholars Program permits students in their final year at an ABA approved law school to devote their last semester of study to performing at least 12 weeks of full-time pro bono service for the poor through an approved externship program, law school clinic, legal services provider, law firm or corporation. The placement must be approved by both the student's law school and the Chief Administrator of the Courts or a designee, and the work must be supervised both by an attorney admitted to practice in the jurisdiction where the work is performed and by a faculty member of the student's law school.

By participating in the program, students are permitted to take the New York bar examination in February during the final year of study and, upon successful completion of the program and any other graduation and admission requirements, are eligible for accelerated admission to the bar.

I. Skills competency requirement for bar admission: 22 NYCRR 520.18

In addition to the requirements for pro bono services, applicants seeking admission to the bar, including foreign-educated candidates, must satisfy the skills and professional values requirements of Rule 520.18. The requirements can be met through one of five pathways listed in the rule, three of which relate to and can be satisfied by an applicant's law school study. The other two are apprenticeship and practice in another jurisdiction. Proof of compliance with one of the pathways must be filed with the application for admission to practice in the Appellate Division where admission is sought. Applicants for admission on motion without examination are exempt from the requirement, as are applicants qualifying to take the bar examination under Rule 520.4 (law office study) or Rule 520.5 (law school not ABA approved plus actual practice).

J. Lawyers Assistance Program

Lawyer competence is directly related to lawyer well-being. To be a good lawyer, you must be a healthy lawyer. The practice of law is a stressful business. Many law students and lawyers suffer from chronic stress, depression, and substance use/abuse. If you are struggling with any such problem, you are encouraged to seek help. The New York State Bar Association Lawyer Assistance Program (LAP) provides education and assistance to lawyers, judges, law school students, and immediate family members who are affected by the problem of substance abuse, stress, depression or other mental health issues. Its goal is to assist in the prevention, early identification and intervention of problems that can affect professional conduct and quality of life. LAP services are free and confidential. Services provided by LAP include:

- early identification of impairment;
- intervention and motivation of impaired attorneys to seek help;
- assessment, evaluation and development of an appropriate treatment plan;
- referral of impaired attorneys to community resources, self-help groups, outpatient counseling, detoxification and rehabilitation services;
- information and referral for depression; and
- training programs on alcoholism, drug abuse and stress management.

To get help, call 1-800-255-0569 or send an email to lap@nysba.org. For additional information, see: https://nysba.org/lawyer-assistance-program.

REAL PROPERTY

I. Landlord and Tenant

Article 7 of the Real Property Law (RPL) contains many specific provisions regarding leases of real property. Additional and different rules may apply to public housing, rent-stabilized properties and cooperatives, which are not discussed in these materials.

A. Formation of lease: GOL 5-702, 5-703

A lease for a period longer than one year is void unless in writing subscribed by the party to be charged or his or her lawful agent (GOL 5-703). A lease for a period of one year or less may be oral.

Every written residential lease must be written in a clear and coherent manner, using words with common and everyday meanings, and must be appropriately divided and captioned in its various sections (GOL 5-702).

B. Tenant protections in residential leases: RPL 235-e, 235-f, 237; 237-a, 223-b, 227-e

A landlord cannot restrict occupancy of residential premises to a tenant or tenants and immediate family (RPL 235-f [2]). A lease entered into by one tenant is construed to permit occupancy by the tenant, the immediate family of the tenant, one additional occupant, and the dependent children of that occupant provided that the tenant or the tenant's spouse occupies the premises as his or her primary residence (*Id.* at [3]). A lease entered into by two or more tenants is construed to permit occupancy by the tenants, the immediate family of the tenants, and other occupants and dependent children of those occupants, provided that the total number of tenants and occupants, excluding dependent children, does not exceed the number of tenants specified in the lease and that at least one tenant or a tenant's spouse occupies the premises as his or her primary residence (*Id.* at [4]).

A landlord may not refuse to rent or discriminate in the terms of any rental on the ground that the tenant has a child or children, but this prohibition does not apply to:

- housing units for senior citizens subsidized, insured, or guaranteed by the federal government; or
- one or two-family owner-occupied dwelling houses or manufactured homes; or
- manufactured home parks intended and operated for occupancy by persons 50-55 years of age or older

(RPL 237-a).

A lease cannot contain a clause requiring tenants to remain childless (RPL 237).

A landlord of a residential premises cannot refuse to rent or offer a lease to a potential tenant on the basis that the potential tenant was involved in a past or pending landlord-tenant action or summary proceeding by a prior landlord to recover possession of leased premises (RPL 227-f).

A landlord of residential premises, other than an owner-occupied dwelling with less than four units, is barred from evicting tenants, substantially changing the terms of a tenancy or refusing to renew a lease in retaliation for a tenant making a good faith complaint about, or bringing an action to enforce rights regarding, the landlord's violation of the warranty of habitability or other health or safety law, or in retaliation for a tenant's participation in the activities of a tenant's organization. There is a rebuttable presumption that a landlord is acting in retaliation if the landlord attempts to evict a tenant within one year after the tenant makes such a complaint or brings such an action. In a civil action brought against a landlord for retaliation, a tenant may recover attorney's fees (RPL 223-b).

Landlords have a duty in all residential leases to mitigate damages when a tenant vacates a premises in violation of the lease by taking reasonable steps to re-let the premises at fair market value or at the rate agreed to during the term of the tenancy, whichever is lower, and a lease provision exempting a landlord's duty to mitigate damages is void as contrary to public policy (RPL 227-e).

Upon the receipt of a payment of rent directly to the landlord (or agent of the landlord), in the form of cash, or of any instrument other than the personal check of the tenant (and if requested in writing by the tenant for a payment by personal check), the landlord must immediately provide the tenant with a signed, written receipt containing the date, the amount, the location of the premises, and the period for which paid; if such payment is paid indirectly, the receipt must be issued within 15 days. The landlord must keep a record of cash receipts for three years (RPL 235-e [b]–[c]). If the landlord does not receive payment within five days of when it is due, the landlord must send the tenant, by certified mail, a written notice stating the failure to receive such rent payment, and the failure to comply is an affirmative defense in a summary proceeding based on non-payment of rent (RPL § 235-e [d], *see* Real Property, I.H.). In certain situations, cooperative housing corporations are excluded from the requirement to use certified mail to deliver the notice (*id.*).

C. Assignment and sublease: RPL 226-b

Unless a greater right to assign is conferred by the lease, a tenant may not assign a residential lease without consent of the landlord, which consent may be unconditionally withheld without cause, but a landlord who unreasonably withholds consent must release the tenant from the lease if the tenant so requests upon 30 days' notice (RPL 226-b [1]).

But if the residential lease is in a dwelling having four or more residential units, a tenant has a right to sublease, upon complying with notice provisions contained in the statute, subject to written consent of the landlord, which consent may not be unreasonably withheld (RPL 226-b [2]).

D. Warranty of Habitability: RPL 235-b

Every written or oral lease for residential property is deemed to contain a warranty of habitability. The landlord is deemed to warrant that the leased premises are fit for human habitation and for the uses reasonably intended by the parties and that the occupants of such premises shall not be subjected to any conditions which would be dangerous, hazardous or detrimental to their life, health or safety. Any agreement by a tenant waiving or modifying his or her rights under the statute is void as contrary to public policy, and a court may award punitive damages to a tenant if the landlord's breach of the warranty was intentional and malicious or demonstrated a conscious disregard of severe risks to the life, health, or safety of the tenant (RPL 235-b; *Minjak Co. v Randolph*, 140 AD2d 245 [1st Dept 1988]).

E. Holdovers: RPL 232-c

If a term of lease is longer than one month, the tenant's holding over does not give the landlord the option to hold the tenant to a new term equal to the term of the lease. The landlord may proceed to remove the tenant as permitted by law, but if the landlord accepts rent for any period subsequent to the lease expiring, a month-to-month tenancy is created.

F. Termination of monthly or month-to-month tenancy: RPL 232-a, 232-b

1. New York City: RPL 232-a

In New York City a monthly or month-to-month tenant cannot be removed on grounds of holding over unless, at least 30 days before expiration of the term, the landlord serves notice in writing, in the same manner as a notice of petition in summary proceedings (similar to service of a summons, *see* RPAPL 735), that the landlord elects to terminate the tenancy and that unless the tenant removes from such premises on the day designated in the notice, the landlord will commence summary proceedings to remove the tenant.

2. Outside New York City: RPL 232-b

Outside of New York City any tenant and any non-residential landlord may terminate a monthly tenancy or a tenancy from month-to-month by notifying the other party at least one month before expiration of the term (RPL 232-b)(residential landlords seeking to terminate a monthly tenancy are governed by RPL 226-c; *see* Real Property, I.G.). Although this statute is permissive and the parties may agree to a different notice requirement, it effectively sets one month as the minimum (*Carlo v Koch-Matthews*, 53 Misc3d 466, 469 [Cohoes City Court 2016]). And the statute does not change the common law requirement of one month's notice for termination of a month-to-month tenancy (*Id.* at 471-472).

G. Notice of non-renewal or rent increase for residential tenancy: RPL 226-c

A landlord seeking to terminate a residential tenancy or to increase the rent 5% or more must notify the tenant as follows:

- If the tenant has occupied the premises (or has a lease term) less than one year, the landlord must give at least 30 days' notice;
- If the tenant has occupied the premises (or has a lease term) one year or more but less than two years, the landlord must give at least 60 days' notice;
- If the tenant has occupied the premises (or has a lease term) more than two years, the landlord must give at least 90 days' notice.

If the landlord fails to provide timely notice, the tenancy will continue under the existing terms of the tenancy from the date on which the landlord gives actual written notice until the notice period expires (RPL 226-c). Cooperative housing corporations are excluded from the notice requirement in certain situations.

H. Breach and remedies, summary proceedings: Real Property Actions and Proceedings Law (RPAPL) art 7; RPL 234

Any breach of a lease by the tenant gives the landlord the right to commence a special proceeding to recover possession of the property. Summary proceedings are governed by and require strict adherence to the procedures and time frames set forth in RPAPL Article 7. If the breach is nonpayment of rent, written demand for rent must have been served on the tenant with at least 14 days' notice requiring either payment of the rent or possession of the premises (RPAPL 711). Tenants are permitted one adjournment of the scheduled hearing date for not less than 14 days (RPAPL 745 [1]). If the breach is a default in the payment of rent, payment to the landlord of the full amount of rent due any time before the hearing renders moot the grounds on which the proceeding was commenced (RPAPL 731 [4]).

It is a class A misdemeanor, punishable by the appropriate criminal penalties and also by civil penalties of not less than $1,000 nor more than $10,000 per violation, for a landlord to unlawfully evict a tenant by illegally locking the tenant out or by using or threatening to use force (RPAPL 768).

If the tenant abandons leased commercial property, the landlord has no duty to mitigate damages by re-letting (*cf.* Real Property, I.B.; *Holy Props. Ltd., L.P. v Cole Prods. Inc.*, 87 NY2d 130 [1995]).

If a residential lease provides that in any action or summary proceeding the landlord may recover legal fees from the tenant if successful, there is implied in the lease a covenant to pay legal fees incurred by the tenant as the result of the failure of the landlord to perform any covenant or agreement or in a successful defense of a summary proceeding commenced by the landlord. Any waiver of this statutory right is void as against public policy, and a landlord is precluded from recovery of attorney's fees upon a default judgment (RPL 234). Certain exceptions apply for cooperative housing corporations (*id.*).

I. Deposits: GOL 7-103, 7-105, 7-108

Any security deposits by the tenant are held by the landlord in trust, may not be commingled with the landlord's personal moneys, and are not an asset of the landlord (GOL 7-103 [1]).

If the landlord deposits the security in a bank, the landlord must notify the tenant, providing appropriate information. If the deposit is in an interest-bearing account, the landlord may retain 1% for expenses, and any balance is held for or paid to the tenant (GOL 7-103 [2]).

If a rental is in a building containing six or more family dwelling units, the landlord must deposit the security in an interest-bearing account (GOL 7-103 [2-a]).

If title to a leased property is transferred to a new owner, a landlord must transfer any deposits to the new owner and notify the tenant of the transfer (GOL 7-105).

Security deposits in residential leases cannot exceed one month's rent (GOL 7-108 [1-a] [a]). Exceptions apply to owner-occupied cooperative housing apartments (*id.*).

Upon termination of a tenancy, the landlord must provide the tenant with written notice of the right to have, and be present for, an inspection of the premises before vacating. After the inspection the landlord must notify the tenant of any proposed repairs or cleaning and must give the tenant the opportunity to cure any such condition before the end of the tenancy (GOL 7-108 [1-a] [d]). The landlord within 14 days after the tenant vacates the premises must provide the tenant with an itemized statement indicating the basis for the amount of the deposit retained, if any, and refund the remaining deposit. If the landlord fails to provide the statement and deposit refund within 14 days, the landlord forfeits any right to retain any portion of the deposit. (*Id.* at [e]). In any action or proceeding disputing any amount of the deposit retained, the landlord bears the burden of proof as to the reasonableness of the amount retained (*Id.* at [f]).

II. Real Property Contracts

A. Statute of Frauds: GOL 5-703

Under New York's statute of frauds any contract for the sale of real property is void unless in writing and signed by the party to be charged or his or her lawful agent (*See* Contracts, V.). A land purchase option constitutes the creation or grant of an interest in real property, and thus falls within the statute of frauds (*Scutti Enterprises, Inc. v Wackerman Guchone Custom Builders, Inc.,* 153 AD2d 83, 87 [4th Dept 1989]).

B. Condition of property: RPL art 14; General Business Law §§ 777, 777-a

Under the doctrine of caveat emptor a vendor has no duty to disclose any information concerning the property, with some legal and equitable exceptions (*Meyers v Rosen*, 69 AD3d 1095 [2d Dept 2010]) including:

- Property Condition Disclosure Statement (RPL 462)

Every seller of real property improved by a one to four-family dwelling used, or to be used, as the home or residence of one or more persons (*See* RPL 461) pursuant to a contract must complete, sign and deliver the required disclosure statement to the buyer or buyer's agent prior to the buyer signing a binding contract (RPL 462). If the seller provides the required statement and before closing acquires knowledge which renders the statement materially inaccurate, the seller must deliver a revised statement to the buyer as soon as practicable (RPL 464). A seller who provides a statement or fails to provide a revised statement when required may also be held liable for actual damages resulting from a willful failure to provide correct information (RPL 465 [2]).

- Housing Merchant Implied Warranty: General Business Law (GBL) art 36-B

This warranty is implied in any sale by a builder of a new home and runs from the date the buyer takes occupancy or title, whichever is first. The warranty provides that (a) for one year the home will be free from defects due to a failure to have been constructed in a skillful manner, (b) for two years the plumbing, electrical, heating, cooling and ventilation systems of the home will be free from defects due to a failure by the builder to have installed such systems in a skillful manner, and (c) for six years the home will be free from material defects (GBL 777-a [1]). Subject to strict requirements, the builder may substitute an express, written limited warranty (GBL 777-b).

- Active concealment, confidential or fiduciary relationship

If some conduct, more than mere silence, on the part of the seller rises to the level of active concealment, or if there is a confidential or fiduciary relationship between the parties, a seller may have a duty to disclose information concerning the property (*See Stambovsky v. Ackley,* 169 AD2d 254 [1st Dept 1991]).

C. Risk of loss: GOL 5-1311

New York has adopted the Uniform Vendor and Purchaser Risk Act (GOL 5-1311), so unless otherwise expressly provided:

- If neither legal title nor possession has been transferred to the buyer and if all or a material part of the property is destroyed without fault of the buyer or taken by eminent domain, the seller cannot enforce the contract and the buyer is entitled to recover any portion of the price paid.

- If neither legal title nor possession has been transferred to the buyer and if only an immaterial part of the property is destroyed without fault of the seller or taken by eminent domain, neither party is deprived of the right to enforce the contract, but there will be an abatement of the purchase price.

- If either legal title or possession of the property has been transferred, the buyer bears the loss.

III. Real Property Mortgages

A. Lien theory

In New York a mortgage creates a lien on the property (*e.g.*, *Matter of City of New York [Braddock Ave.],* 251 App Div 669, 672, [2nd Dept 1937] *affd*. 278 NY 163 [1938]). It is not a transfer of title.

B. Transfers

In New York, the mortgage always follows the note. An assignment of the mortgage without the note is void (*See U.S. Bank N.A. v Dellarmo*, 94 AD3d 746 [2d Dept 2012]). An assignment of the note will transfer the mortgage even if the assignment is silent as to the mortgage.

C. Enforcement: CPLR 5230 (a); RPAPL art 13

1. Election of remedies by mortgagee upon default by mortgagor

A mortgagee may bring a legal action on the note. Execution of a judgment obtained in an action on the note must specify that no part of the mortgaged property may be levied upon or sold thereunder (CPLR 5230 [a]). The mortgagee may not then bring a foreclosure action until execution has been returned wholly or partly unsatisfied (RPAPL 1301 [1]).

A mortgagee may bring an equitable action for foreclosure and sale (RPAPL art 13). The mortgagee may not then bring a separate action on the debt without leave of court (RPAPL 1301 [3]).

2. Ownership of Note

The plaintiff, whether the original mortgagee or an assignee of the mortgage, must allege and prove ownership of the note at the time the action is commenced (*See Wells Fargo Bank N.A. v Marchione*, 69 AD3d 204 [2d Dept 2009]).

3. Residential foreclosure notices

If the mortgaged property is a one to four-family dwelling or a condominium unit occupied by the borrower as his or her principal residence and the secured debt was incurred primarily for personal, family, or household purposes, at least 90 days before a foreclosure action is commenced the borrower must be mailed a notice explaining that the borrower is in default and at risk of losing his or her home and providing a list of government approved housing counseling agencies which may be able to provide assistance (RPAPL 1304).

There are additional statutory notices which must be delivered (a) to the mortgagor when the summons and complaint are served if the action relates to an owner-occupied one to four-family dwelling and (b) to any tenant of a dwelling unit in a mortgaged property within ten days of the service of the summons and complaint, explaining in detail the significance of the action to them, advising them of certain rights and informing them of assistance that may be available to them (RPAPL 1305). And if the mortgaged property is residential property containing not more than three units, the summons must contain a special notice headed "YOU ARE IN DANGER OF LOSING YOUR HOME" (RPAPL 1320).

4. Redemption

The mortgagor has a right to redeem by paying into court the full amount due and the costs of the action until the foreclosure sale takes place (RPAPL 1341). After the sale there is no right to redeem (*See Wells Fargo Bank, N.A. v Carney*, 50 AD3d 287 [1st Dept 2008]).

5. Deficiency judgment

Simultaneously with a motion to confirm the sale, if made within 90 days of the delivery of the deed to the purchaser at the sale, the plaintiff may move for leave to enter a deficiency judgment. The amount is the sum of (1) the amount owed as set forth in the judgment of foreclosure with interest and (2) all prior liens and encumbrances with interest, minus the greater of (1) the market value as determined by the court or (2) the foreclosure sale price (RPAPL 1371).

IV. Title

A. Concurrent Estates: EPTL 6-2.2 (d)

1. Tenants in common

Under EPTL 6-2.2, there is a presumption that a disposition to two or more persons creates in them a tenancy in common unless it is specifically declared to be a joint tenancy. Tenants in common are presumed to have equal interests in the property, but the presumption can be rebutted if one party contributed more than the other (*See Johnson v Depew,* 33 AD2d 645 [4th Dept 1969]).

2. Joint tenancy

A joint tenancy is "an estate held by two or more persons jointly, with equal rights to share in its enjoyment during their lives, and creating in each joint tenant a right of survivorship" (*Island Fed. Credit Union v Smith*, 60 AD3d 730 [2d Dept 2009]). A joint tenancy at common law required the unities of possession, interest, title, and time. In New York a joint tenancy may be created by a deed in which one (or more) of the grantees is also a grantor even though the unities of time and title are technically not satisfied (RPL 240-b).

A disposition to persons not legally married to one another but described as husband and wife, spouses, husbands or wives creates in them a joint tenancy unless expressly declared to be a tenancy in common (EPTL 6-2.2 [d]).

3. Tenancy by the entirety

A disposition of real property to married persons creates in them a tenancy by the entirety, unless expressly declared to be a joint tenancy or a tenancy in common (EPTL § 6-2.2 [b]). One party may convey or mortgage his or her interest, but the grantee or mortgagee (or purchaser at a foreclosure sale) takes subject to the survivorship right of the other party (*See Lawriw v City of Rochester*, 14 AD2d 13 [4th Dept 1961], *affd* 11 NY2d 759 [1962]; *see also Hiles v Fisher*, 144 NY 306 [1895]). If the tenancy by the entirety is subsequently terminated by divorce, the interest of the grantee or purchaser at a foreclosure sale will be that of a tenant in common (*See V.R.W., Inc. v Klein*, 68 NY2d 560 [1986]).

4. Partition rights

Joint tenants and tenants in common, but not tenants by the entirety (*Ripp v Ripp*, 38 AD2d 65 [2d Dept, 1971], *affd* 32 N.Y.2d 755 [1973]), who do not want to hold and use the property in common are entitled to have the property partitioned as a matter of right in the absence of an agreement against, or a testamentary restriction upon, partition (*Chew v Sheldon*, 214 NY 344 [1915]; *Tedesco v Tedesco*, 269 AD2d 660 [3d Dept 2000]; RPAPL art IX). A partition action may result in a physical division of the property among the parties, but if the property cannot be fairly so divided, as is frequently the case, the court will direct the property be sold and the proceeds divided (RPAPL 915). However, the statutory right of partition is equitable in nature so that a joint tenant or tenant in common seeking partition against a cotenant is entitled to relief only after any equities in favor of the cotenant are considered (*Ford v Knapp*, 102 NY 135 [1886]; *Ripp*, 38 AD2d at 68).

New York has adopted the Uniform Partition of Heirs Property Act (RPAPL 993), which generally applies to any partition action where two or more interested parties are related by blood or marriage, no matter how distantly, and which is intended to protect such relatives from predatory real estate speculators through additional service (posting) requirements, required court conferencing regarding settlement, and appraisal requirements.

B. Adverse possession: RPAPL 501, 541, 543

In New York, the statutory period for adverse possession is ten years (CPLR 212 [a]) (also for an easement by prescription [*Bouton v Williams*, 42 AD3d 795 (3d Dept 2007)]). The occupancy of the adverse possessor must be adverse, under claim of right, open and notorious, continuous, exclusive, and actual (RPAPL 501 [2]). The party claiming adverse possession may establish possession for the prescriptive period by “tacking” the time that the party possessed the property onto the time that the party's predecessor adversely possessed the property (*Brand v Prince*, 35 NY2d 634 [1974]).

For purposes of adverse possession, the occupancy of one tenant in common is deemed to have been the possession of the other, even though the occupying tenant has claimed to hold adversely to the other. This presumption terminates after ten years of exclusive occupancy by the occupying cotenant, who thus may acquire title by adversely possessing for 20 years (RPAPL 541).

By statute enacted in 2008:

- Claim of right means a reasonable basis for the belief that the property belongs to the claimant, but a claim of right is not required if the ownership cannot be ascertained from the records (RPAPL 501 [3]). The "reasonable basis" requirement will defeat an adverse possession claim by one who in pleadings or otherwise acknowledges that during the statutory period another person owned the subject property and that the claimant had no reasonable basis to believe that the property belonged to the claimant (*Kheel v Molinari*, 165 AD3d 1576 [3d Dept 2018], leave to appeal denied, 32 NY3d 1194 [2019]).

- For an adverse possession based upon a written instrument or judgment, the claimed land is deemed to have been possessed and occupied:

    1. Where there has been acts sufficiently open to put a reasonably diligent owner on notice (under former law the requirement was that the land must have been "usually cultivated or improved"), or
    2. Where it has been protected by a substantial enclosure (more than a fence is required, as indicated below), or
    3. Where, although not enclosed, it has been used for the supply of fuel or of fencing timber, either for the purposes of husbandry or for the ordinary use of the occupant

(RPAPL 512).

When there has been a continued occupation and possession of all or any part of the premises included in the instrument or judgment, under the same claim, the entire premises so included are deemed to have been held adversely; except that when they consist of a tract divided into lots, the possession of one lot is not deemed a possession of any other lot (RPAPL 511).

- For an adverse possession not founded upon a written instrument or judgment, the claimed land is deemed to have been possessed and occupied only if the claimed land is deemed to have been possessed and occupied as set forth in one of the foregoing items 1 or 2 (RPAPL 522), and the premises so actually occupied, and no others, are deemed to have been held adversely (RPAPL 521).

- De-minimis, non-structural encroachments, including fences, hedges, shrubbery, plantings, sheds and non-structural walls, and acts of lawn mowing or similar maintenance across the boundary line of an adjoining owner are all deemed to be permissive and non-adverse (RPAPL 543).

Note: Any adverse claim that vested before the 2008 statute (i.e., vested before July 7, 2008) is not affected by it (*See Pritsiolas v Apple Bankcorp, Inc.*, 120 AD3d 647 [2d Dept 2014]).

C. Recording act: RPL 290, 291, 292, 303, 309-a

New York is a race-notice jurisdiction whereby an unrecorded conveyance is invalid against a subsequent good faith purchaser for value who first records (RPL 291). Actual knowledge of any prior unrecorded conveyance, or of any title to the premises, or knowledge and notice of any facts that should put a prudent person upon inquiry, will demonstrate a lack of good faith (*Brown v Volkening*, 64 NY 76 [1876]).

Although a mortgage is a lien and not a transfer of title, for purposes of the recording act a mortgage is a conveyance (RPL 290 [3]).

Judgments are not protected by the recording act, so a mortgage prior in time to a judgment retains priority even if it is unrecorded.

Real Property Law 291 requires that for a document to be recorded, it must be duly acknowledged (*See* Appendix C) by each person executing it or "proved" by the use of a subscribing witness (RPL 292, 304).

D. Restrictive covenants

For a restrictive covenant to be enforced the owner of the burdened property must have actual or constructive notice of the covenant. Constructive notice will be provided by a recorded deed only if the deed is in the direct chain of title of the burdened property (*Witter v Taggart*, 78 NY2d 234 [1991]). A deed from a prior owner of the burdened property to a different person for another lot is not in the direct chain of title of the burdened property, even if the deed was recorded prior to the deed for the burdened property and the other lot is an adjoining lot in the same tract as the burdened property.

TORTS AND TORT DAMAGES

I. Negligence and Related Tort Concepts

A. Comparative negligence/assumption of risk: CPLR 1411, 1412

New York is a pure comparative negligence jurisdiction. In an action to recover damages for personal injury, injury to property or wrongful death, the culpable conduct attributable to the claimant or decedent, including contributory negligence or assumption of risk, does not bar recovery. However, such conduct diminishes the amount of damages otherwise recoverable in the proportion which the culpable conduct attributable to the claimant or decedent bears to the culpable conduct which caused the damages (CPLR 1411). For example, if a jury returns a verdict in favor of the plaintiff in the amount of $100,000 and apportions the liability 60% to the plaintiff and 40% to the defendant, the plaintiff may recover $40,000.

Culpable conduct, including contributory negligence and assumption of risk, claimed in diminution of damages is an affirmative defense to be pleaded and proved by the party asserting the defense (CPLR 1412, EPTL 5-4.2). Damages are diminished in cases of implied assumption of the risk, but where the plaintiff voluntarily assumes the known risk of injury, such express assumption of risk will absolve the defendant of any duty owed to the plaintiff (*Abergast v Board of Educ. of S. New Berlin Cent. School*, 65 NY2d 161 [1985]). A participant in a sports or recreational activity voluntarily assumes and consents to the risks which are inherent in and arise out of the nature of the sport generally and which flow from participation, thereby absolving a defendant, such as the proprietor of the facility where the activity occurs, from any duty to the participant, absent any reckless or intentional conduct by the defendant or any concealed or unreasonably increased risks (*Morgan v State of New York*, 90 NY2d 471 [1997]).

B. Violation of statute or regulation

As a general rule, violation of a state statute that imposes a specific duty constitutes negligence per se and violation of a municipal ordinance or administrative rule or regulation constitutes some evidence of negligence (*Elliot v City of New York*, 95 NY2d 730 [2001]). In certain cases, violation of a state statute may impose absolute liability (*See e.g.,* Torts and Tort Damages, I.F.).

C. Landowner liability

1. General rule: GOL 9-103

In determining the duty owed by the owner or occupier of land to a person entering the premises, New York has abandoned the common law distinctions among invitees, licensees and trespassers. Instead, New York has adopted the single standard of reasonable care under the circumstances. A landowner must act as a reasonable person in maintaining the premises in a reasonably safe condition in view of all of the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk (*Basso v Miller*, 40 NY2d 233 [1976]).

2. Recreational use: GOL 9-103

Under New York's recreational use statute (GOL 9-103), a landowner who allows others to use land without consideration has no duty to keep premises safe for entry or use by others for hunting, fishing, boating, hiking, cross-country skiing, sledding, snowmobile operation or other recreational activities or to give warning of any hazardous condition on the property. A landowner can be found liable, however, for willful or malicious failure to guard or to warn against a dangerous condition, use, structure or activity, or generally for injury suffered where permission to use the property was granted for consideration.

D. Intra-family immunity, negligent supervision/entrustment with dangerous instrument

New York has abrogated the defense of intra-family immunity for non-willful torts. Thus, actions between parents and children are actionable to the same extent that such actions are actionable when brought by non-family members (*Gelbman v Gelbman*, 23 NY2d 434 [1969]). However, a parent's negligent failure to supervise his or her child is not actionable by the child, and third-party tortfeasors are not entitled to contribution from parents for liability resulting, in part, from negligent supervision of the child (*Holodook v Spencer*, 36 NY2d 35 [1974]). There is an exception when the parent has breached a duty owed to third parties by negligently permitting an infant child to use a dangerous instrument. In that case, the parent may be found liable to the third party injured as a consequence of the parent's failure to protect the third party from the foreseeable harm that results from a child's improvident use of a dangerous instrument, which harm may include the third party's concurrent tort liability for injury to the child. Accordingly, a third party cast in liability for injury to a child may seek contribution from a parent who has negligently entrusted the child with a dangerous instrument and whose negligence contributed to the child's injury (*Nolechek v Gesuale*, 46 NY2d 332 [1978]).

E. Negligent infliction of emotional distress

New York has adopted a zone-of-danger rule with respect to emotional distress suffered upon witnessing the injury of a member of plaintiff's immediate family. A plaintiff is in the zone-of-danger if the plaintiff is exposed to an unreasonable risk of injury due to the defendant's conduct. Such a plaintiff may recover damages for injuries suffered in consequence of shock or fright resulting from the contemporaneous observation of serious physical injury or death of a member of the plaintiff's immediate family, where the defendant's same conduct was a substantial factor in causing injury to the plaintiff's family member (*Bovsun v Sanperi*, 61 NY2d 219 [1984]). The rule is based on the traditional negligence concept that, where a defendant has unreasonably endangered the plaintiff's physical safety, the defendant has breached a duty owed directly to plaintiff, entitling plaintiff to recover all damages sustained, including those damages suffered as a consequence of witnessing the suffering of an immediate family member also injured by defendant's conduct (*Id.*).

Medical malpractice resulting in miscarriage or stillbirth is a violation of a duty of care to the expectant mother, entitling her to damages for emotional distress, even in the absence of an independent injury to the mother (*Broadnax v Gonzalez*, 2 NY3d 148 [2004]).

F. Statutory standard of care owed to construction workers: Labor Law §§ 240, 241

New York's "Scaffolding Law" (Labor Law § 240) imposes a duty on contractors, owners and their agents to furnish or erect scaffolding, hoists, stays, ladders and other devices so as to give proper protection to workers involved in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure. The statute imposes absolute liability for its violation, and a plaintiff's comparative fault will not reduce the recovery, as long as there is a violation of the statute and the plaintiff's conduct is not the sole proximate cause of his or her injuries (*Blake v Neighborhood Housing Services of NYC, Inc.*, 1 NY3d 280 [2003]). There is an exception for the owners of one or two-family dwellings who contract for but do not direct or control the work. The statute imposes strict liability on owners, contractors and their agents for its violation where a worker sustains an elevation-related injury, whether due to a falling object or a falling worker, where the injury is the consequence of the absence or improper use of such required safety devices.

Labor Law § 241 requires contractors and owners and their agents, except for owners of one and two-family dwellings who contract for but do not direct or control the work, to comply with various requirements. Subdivision 6 requires that all areas in which construction, excavation or demolition work is being performed be so constructed, shored, guarded and operated so as to provide reasonable and adequate protection to persons employed or lawfully frequenting such places. The commissioner of labor is authorized to make rules to carry the provisions of the subdivision into effect and has done so (12 NYCRR Part 23). Violation of such rules is evidence of negligence (*See* Torts and Tort Damages, I.B.).

G. Vicarious liability: GOL § 11-101 (Dram Shop Act); Alcohol Beverage Control Act § 65; Vehicle and Traffic Law § 388

New York's Dram Shop Act (GOL § 11-101) creates a cause of action in favor of a person injured in person, property, means of support or otherwise by an intoxicated person as against any person who, by unlawfully selling liquor to or unlawfully assisting in procuring liquor for an intoxicated person, caused or contributed to such intoxication. The Dram Shop Act requires a commercial sale of alcohol (*D'Amico v Christie*, 71 NY2d 76 [1987]). Actual and exemplary damages may be recovered. An unlawful sale may be a sale to a person under the age of 21, a visibly intoxicated person or a habitual drunkard (Alcohol Beverage Control Act § 65).

Dram Shop liability extends to a person, including a social host, who knowingly causes intoxication in a person under the age of 21 by furnishing, or assisting in procuring, alcohol to such person with knowledge or reasonable cause to believe that such person was under the age of 21 (GOL 11-100). "Furnishing" within the meaning of GOL 11-100 may include not only personally delivering alcohol to underage individuals, but also participating in a "deliberate plan" to do so (*Rust v Reyer*, 91 NY2d 355, 360 [1998]).

The owner of a vehicle is vicariously liable for death or injury to a person or property resulting from the negligent use or operation of the vehicle by a person using or operating the vehicle with the express or implied permission of the owner (Vehicle and Traffic Law § 388). The statute creates a strong presumption of permissive use that can only be rebutted with substantial evidence sufficient to show the driver of the vehicle was not operating it with the express or implied permission of the owner (*Amex Assur. Co. v Kulka*, 67 AD3d 614 [2d Dept 2009]).

As a general rule, parents are not vicariously liable for the torts of their minor children. However, the parent of an infant over 10 and less than 18 years of age is liable for damages caused by the infant who willfully, maliciously or unlawfully damages, destroys or defaces public or private property, who wrongfully takes personal property from a building, or who falsely reports an incident or places a false bomb. The parent's liability is limited to the sum of $5,000 (GOL 3-112).

H. Wrongful death actions: EPTL 5-4.1, 5-4.3, 5-4.4

The personal representative of a decedent's estate may bring an action to recover damages due to injury resulting in the decedent's death against a person who would have been liable to the decedent if death had not ensued (EPTL 5-4.1). The damages recoverable are the pecuniary losses suffered by those for whose benefit the action is brought (EPTL 5-4.3). The proceeds of a wrongful death action are not assets of the estate to be distributed in accordance with the decedent's will or the laws of intestacy. Rather, they are exclusively for the benefit of the decedent's distributees (*See* Trusts, Wills and Estates, I.A) and are to be distributed in accordance with the pecuniary injuries suffered by the distributees (EPTL 5-4.4 [a]). For this purpose, where the decedent is survived by a parent or parents and a spouse and no issue, the parent or parents will be deemed to be distributees (*Id.*), even though they would not be intestate distributees (*See* Trusts, Wills and Estates, I.A).

The plaintiff in a wrongful death case is not held to the same degree of proof required where an injured party can personally testify and describe the occurrence upon which the action is based (*Noseworthy v City of New York*, 298 NY 76 [1948]). The *Noseworthy* doctrine (which has also been applied in cases of amnesia, *Schechter v Klanfer*, 28 NY2d 228 [1971]), where applicable, requires a jury charge explaining the lesser burden of proof.

I. Negligent misrepresentation, including duty to non-contractual party

In a commercial context, a duty to speak with care exists when the relationship between the parties is such that one party may justifiably rely upon the other for information. Liability for negligent misrepresentation in a commercial transaction may be imposed where there is a special relationship between parties giving rise to an exceptional duty regarding commercial speech and justifiable reliance on such speech. Whether the relationship between the parties is such that the reliance is justified is generally a question of fact, with consideration given to whether the person making the representation held unique or special expertise; whether a special relationship of trust or confidence existed between the parties; and whether the speaker was aware of the use to which the information would be put and supplied it for that purpose (*Kimmell v Schaeffer*, 89 NY2d 257 [1996]).

An accountant may be liable to a party with whom the accountant does not have privity of contract where the party relies, to the party's detriment, on inaccurate financial reports prepared by the accountant if: (1) the accountant was aware that the financial reports would be used for a particular purpose; (2) in furtherance of that purpose, a known party was intended to rely; and (3) there was some conduct on the part of the accountant linking him or her to that party, which evinces the accountant's understanding of that party's reliance (*Credit Alliance Corp. v Arthur Andersen & Co.*, 65 NY2d 536 [1985]).

J. Damages - pleading requirements: CPLR 3017 (c)

In an action to recover damages for personal injuries or wrongful death, the complaint or other pleading containing the claim should contain a prayer for general relief but must not state the amount of damages sought. If the action is brought in Supreme Court, the pleading must state whether or not the amount of damages sought exceeds the jurisdictional limits of all lower courts which would otherwise have jurisdiction.

K. Settlement of infant claims: CPLR 1207, 1208

No settlement of an infant's claim, whether in tort or otherwise, is enforceable unless the parties have obtained judicial approval of the settlement. If no action has been commenced to enforce the claim, a special proceeding must be commenced to obtain judicial approval of any proposed settlement. Any indemnity agreement contained in a general release given by a parent or guardian in an unapproved settlement of an infant's tort claim will be unenforceable as a matter of public policy (*Valdimer v Mount Vernon Hebrew Camps, Inc.*, 9 NY2d 21 [1961]).

II. Contribution, Indemnification and Limitations on Joint and Several Liability

A. Entitlement to and amount of contribution: CPLR 1401, 1402

Persons subject to liability for the same personal injury, property damage or wrongful death may claim contribution among them, regardless of whether an action has been brought or judgment rendered against the person from whom contribution is sought (CPLR 1401). The amount of contribution that may be recovered is the excess paid by the person seeking contribution over and above his or her equitable share of the judgment recovered by the injured party. Equitable shares are determined in accordance with the relative culpability of each person liable for contribution (CPLR 1402). For example, where the judgment in favor of the plaintiff is $100,000 and defendants A and B, who are jointly and severally liable, are determined to be, respectfully, 70% and 30% responsible for the damages, the plaintiff may recover the full amount of the damages from either defendant. If defendant A pays the entire judgment, defendant A may recover $30,000 from defendant B by way of contribution, or if defendant B pays the entire judgment, defendant B may recover $70,000 from defendant A. (Note: in certain circumstances, CPLR Article 16 limits contribution towards non-economic damages by tortfeasors found liable for 50% or less of the total assigned liability [*See* Torts and Tort Damages, II.E.]).

B. How contribution is claimed: CPLR 1403

A cause of action for contribution may be asserted in a separate action or by cross-claim, counterclaim or third party claim in a pending action. The statute of limitations on a claim for contribution is six years, running from the time of payment by the party seeking contribution (*McDermott v New York*, 50 NY2d 211, 217 [1980]).

C. Limitation on claims for contribution in workers' compensation context: Workers' Compensation Law §§ 10, 11

An employer must provide for compensation for the disability or death of its employees from injuries arising out of and in the course of employment regardless of fault and whether the employer, employee, or co-employee was negligent, and an employee's sole remedy against the employer lies in recovery under the Workers' Compensation Law.

Although that is an employee's sole remedy against the employer, the employee may bring an action against any third party who may have caused the injury. If an employee does bring an action against a third party, the employer is not liable for contribution or common law indemnification to the third party for injuries sustained by an employee acting within the scope of his/her employment unless the employee has sustained a "grave injury." A "grave injury" is defined as one of the following:

- Death;
- Permanent and total loss of use or amputation of an arm, leg, hand or foot;
- Loss of multiple fingers or multiple toes, or loss of an index finger;
- Paraplegia or quadriplegia;
- Total and permanent blindness or deafness;
- Loss of nose or an ear;
- Permanent and severe facial disfigurement; or
- An acquired injury to the brain caused by an external physical force resulting in permanent total disability.

Any recovery by the employer from a third party is subject to a lien to the extent of any workers' compensation benefits paid, and notice of commencement of the third-party action must be given to the payor of those benefits (Workers' Compensation Law § 227).

D. Effect of release: GOL 15-108

A release given by an injured party, reciting consideration of more than one dollar ($1.00), to one of two or more persons liable or claimed to be liable in tort for the same injury or wrongful death reduces the claim of the injured party against the other tortfeasor or tortfeasors by the greatest of the amount stipulated in the release, the amount of consideration paid for the release, or the amount of the released tortfeasor's equitable share of the damages under CPLR Article 14 (*See* Torts and Tort Damages, II.A). For example, assume a plaintiff brings an action for personal injuries against defendants A and B, and thereafter releases defendant A from liability for $20,000. If the plaintiff later obtains a judgment against defendant B for $100,000, and the jury determines that defendant A was 40% liable for the damages caused to the plaintiff and defendant B 60% liable, the plaintiff's recovery against defendant B will be reduced by $40,000 (defendant A's equitable share of the damages as it is greater than the $20,000 defendant A paid for the release) and the plaintiff will be limited to recovering $60,000 from defendant B. Thus, plaintiff's total recovery will be $80,000.

A tortfeasor who obtains his or her release from an injured party is relieved of liability for contribution to any other tortfeasor and waives his or her right to claim contribution from any other tortfeasor. Thus, in the above example, if defendant A had paid $50,000 for the release, plaintiff's recovery against defendant B would be reduced by $50,000, and defendant A would have no right to claim contribution from defendant B.

E. Limitation on liability of joint and several tortfeasors for non-economic loss: CPLR Art 16

New York has modified the traditional rules of joint and several liability in certain personal injury cases with respect to non-economic loss. Non-economic loss is defined to include pain and suffering, mental anguish and loss of consortium (CPLR 1600). Specifically, a defendant whose proportionate share of the fault is 50% or less is liable for plaintiff's non-economic loss only to the extent of such proportionate share. The defendant whose liability is less than 50% is thus only severally liable for the claimant's non-economic loss (CPLR 1601, 1602). For example, assume a plaintiff sues defendants A, B and C to recover damages for personal injuries. Assume the jury awards the plaintiff $100,000 in pain and suffering and $50,000 for economic loss (medical expenses, lost wages and the like). Assume also that the jury finds defendant A 10% liable for plaintiff's damages, defendant B 30% liable and defendant C 60% liable. All defendants are jointly and severally liable for plaintiff's $50,000 economic loss. However, while defendant C is liable for the full amount of plaintiff's $100,000 pain and suffering award, defendant A is only liable for $10,000 and defendant B is only liable for $30,000 of that award. Accordingly, if defendant C is insolvent and judgment-proof, plaintiff will not be able to recover more than $40,000 of the $100,000 award for pain and suffering from defendants A and B but will be able to recover the entire award for economic loss from them.

In determining the apportionment of fault for purposes of Article 16, the culpable conduct of any person not a party to the action shall not be considered if the plaintiff is unable with due diligence to obtain jurisdiction over such person. If a plaintiff-employee has sued one or more third parties in connection with a work-related injury, and the third parties cannot obtain contribution or indemnification from the employer because the employee has not sustained a "grave injury" (*See* Torts and Tort Damages, II.C.). CPLR 1601 similarly precludes consideration of the employer's culpable conduct in determining any equitable shares.

The limitations of CPLR Article 16 on joint and several liability do not apply in certain specified circumstances, including:

- To any person held liable by reason of the ownership, use or operation of a motor vehicle;
- To any owner or contractor held liable for having violated a non-delegable duty, such as is imposed on owners and contractors by Labor Law § 240 or § 241 (*See* Torts and Tort Damages, 1.F.);
- To actions requiring proof of intent, such as the torts of fraud or assault;
- To any person held liable for having acted with reckless disregard for the safety of others;
- In a product liability action, to the apportioned share of a manufacturer who would have

been liable under the doctrine of strict liability where the manufacturer is not a party to the action and the plaintiff establishes the inability to obtain jurisdiction over the manufacturer with due diligence;

- To work-related injuries where there is a claim under the Workers' Compensation Law and an action against one or more third patties, to the extent of the equitable share of the employer. Thus:

    - If the action is against only one third party, that party is jointly and severally liable for 100% of the damages.
    - If the action is against multiple third parties, the limitations of Article 16 apply among them to the extent of their own equitable shares, but they are jointly and severally liable for the employer's equitable share.
    - In either case, if the plaintiff sustained a grave injury, any third party paying more than its equitable share may seek contribution from the employer (*See* Torts and Tort Damages, II.C), or

- To persons held liable for causing injury by having unlawfully released a hazardous substance into the environment

(CPLR 1602).

III. Other Torts

A. Defamation

Slander and libel are generally not actionable unless the plaintiff suffers special damages. Special damages consist of loss of something having economic pecuniary value.

The established exceptions (collectively "defamation per se") consist of statements (1) charging a person with committing a serious crime; (2) tending to injure a person in the person's trade, business or profession; or (3) tending to expose a person to hatred, contempt or aversion, or to induce an evil or unsavory opinion of such person in the minds of a substantial number of the community (*Geraci v Probst,* 15 NY3d 336 [2010]; *Liberman v Gelstein*, 80 NY2d 429 [1992]). The law presumes that damages will result from statements in these categories and damages need not be alleged or proven.

In any action for libel or slander, the particular words complained of must be set forth in the complaint, but their application to the plaintiff may be stated generally (CPLR 3016 [a]).

B. Invasion of privacy: Civil Rights Law §§ 50, 51

New York does not recognize a common law right of privacy. However, the use for advertising or trade purposes of the name or picture of any living person without such person's written consent is a misdemeanor (Civil Rights Law § 50). A person whose name, picture or voice is used for purposes of advertising or trade without the person's written consent may seek an injunction and may also sue for damages (Civil Rights Law § 51). If the person's picture is not used for trade or advertising purposes, but rather in connection with the reporting of a newsworthy event or a matter of public interest, the statutory right of privacy is not transgressed (*Messenger v Gruner & Jahr Printing and Pub.,* 94 NY2d 436 [2000]; *Howell v New York Post Co., Inc.,* 81 NY2d 115 [1993]).

C. Prima facie tort

A plaintiff may recover damages for injuries resulting from a "prima facie tort", defined as the infliction of intentional harm, resulting in damage, without excuse or justification, by an act or series of acts which would otherwise be lawful. An essential element of the cause of action is special damages (*ATI, Inc. v Ruder & Finn, Inc.*, 42 NY2d 454, 458 [1977]).

IV. Statutory No-Fault: Insurance Law §§ 5101-5109

A. Purpose

The Comprehensive Motor Vehicle Insurance Reparations Act (New York's "No-Fault" Law) provides a means of compensating victims of automobile accidents for their economic losses promptly and without regard to fault or negligence (*Montgomery v Daniels,* 38 NY2d 41, 46 [1975]). The statutory scheme requires that every owner's policy of liability insurance issued on a motor vehicle provide for the payment of "first-party benefits" to a person injured in the use or operation of the vehicle, other than occupants of another motor vehicle or a motorcycle (Insurance Law § 5103 [a]). Thus, in a two-car accident, an injured party looks to the insurance on the vehicle the party was driving or in which the party was riding as a passenger to recover such items of damage as medical expenses and lost wages, regardless of whether or not the accident was caused by the negligence of the driver or the negligence of the driver of another vehicle. In order to find that the injury arose out of the use or operation of a vehicle (*See* Insurance Law § 5104 [a]), the use or operation of the vehicle must be the proximate cause of the injury (*Cividanes v City of New York*, 20 NY3d 925 [2012]).

B. Basic economic loss: Insurance Law § 5102 (a)

"Basic economic loss" identifies actual "losses" incurred by an eligible injured person up to $50,000 per person. Basic economic loss, as defined in the statute, consists of the following items:

- All necessary medical and related expenses without limitation as to time, provided the need for such services is ascertainable within one year of the date of the accident;
- Loss of earnings, up to $2,000 per month for up to three years from the date of the accident;
- All other reasonable and necessary expenses, up to $25 per day for not more than one year from the date of the accident.

"First-party benefits" are payments to reimburse an injured person for "basic economic loss" incurred.

Certain deductions are applied to wage loss and medical expenses as follows:

- Basic economic wage loss is reduced as follows:
    - 20% of basic economic wage loss,
    - Payments made pursuant to federal or state disability laws, and
    - Payments made by workers' compensation.
- Basic economic medical loss is reduced by workers' compensation payments. This generally results in workers' compensation benefits covering all medical bills, because no-fault pays medical providers at rates set by the Workers' Compensation Board.

(Insurance Law § 5102 [b]).

C. Serious injury determination: Insurance Law § 5102 (d)

A "serious injury" means a personal injury resulting in:

- Death;
- Dismemberment;
- Significant disfigurement;
- A fracture;
- Loss of a fetus;
- Permanent loss of use of a body organ, member, function or system;
- Permanent consequential limitation of use of a body organ or member;
- Significant limitation of use of a body function or system; or
- A medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than 90 days during the 180 days immediately following the accident.

D. Entitlement to and exclusions from coverage for first-party benefits: Insurance Law § 5103

As noted above, every owner's policy of liability insurance issued on a motor vehicle must provide for the payment of "first-party benefits" to a person injured in the use or operation of the vehicle, other than occupants of another motor vehicle or a motorcycle. However, the insurer may exclude from coverage a person who:

- Intentionally causes his or her own injury;
- Is injured as a result of operating a vehicle while intoxicated or while his or her ability to operate the vehicle is impaired by the use of an illegal drug;

- Is injured while in the course of a felony, while seeking to avoid lawful arrest, while operating a vehicle in a speed contest, or while operating or occupying a vehicle known to be stolen.

Any dispute involving the recovery of first-party benefits can be resolved either through arbitration or by lawsuit.

A policy of insurance issued on a motorcycle must provide for the payment of first-party benefits to a pedestrian injured by the use or operation of the motorcycle

E. Availability of action for non-economic loss: Insurance Law § 5104 (a)

In any action by a "covered person" against another "covered person," or against the owner or operator of a motorcycle, for personal injuries arising out of negligence in the use or operation of a motor vehicle, there is no right of recovery for non-economic loss (i.e., pain and suffering), except in the case of a "serious injury", or for "basic economic loss" (Insurance Law § 5104 [a]). A "covered person" may be a pedestrian, owner, operator or occupant injured through the use or operation of an insured motor vehicle (Insurance Law § 5102 [j]). In an action by a "covered person" against a "non-covered person" (for example, the manufacturer of a defective seatbelt), "basic economic loss" is recoverable, but the insurer who paid "first-party" benefits to reimburse the "covered person" for "basic economic loss" has a lien against any judgment to the extent of the benefits paid (Insurance Law § 5104 [b]).

In an action to recover for non-economic loss, the complaint must state that the plaintiff has sustained a serious injury (CPLR 3016 [g]).

F. Availability of action for economic loss in excess of basic economic loss

Although "basic economic loss" is not recoverable in an action by a "covered person" against another "covered person," to the extent economic losses exceed "basic economic loss", they are recoverable but the complaint must state that the plaintiff has sustained economic loss greater than basic economic loss (CPLR 3016 [g]).

V. Municipal Tort Liability

A. Proprietary vs. governmental functions

Public entities are immune from negligence claims arising out of the performance of their governmental functions, including police protection, unless the injured person establishes a special relationship with the entity creating a specific duty to protect that individual (*e.g., Garrett v Holiday Inns,* 58 NY2d 253, 261-2 [1983]). However, when the State or other public entity acts in a proprietary capacity as a landowner, it is subject to the same principles of tort law as is a private landowner (*Miller v State of New York*, 62 NY2d 506 [1984]).

B. Police protection - special relationship/special duty

A municipality's duty to provide police protection is a duty owed to the public at large, and not to any particular individual or class of individuals. A municipality's provision of police protection is generally regarded as a resource-allocating function, best left to the discretion of policy makers. Accordingly, as a general rule, a municipality may not be held liable for injuries resulting from a failure to provide police protection. However, there is an exception to the general rule when a "special relationship" exists between the municipality and the claimant. The elements of this "special relationship" are:

- An assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured;
- Knowledge on the part of the municipality's agents that inaction could lead to harm;
- Some form of direct contact between the municipality's agents and the injured party; and
- That party's justifiable reliance on the municipality's affirmative undertaking.

(*Cuffy v City of NY*, 69 NY2d 255 [1987]).

C. Notice of claim requirement: General Municipal Law § 50-e

A "public corporation" is defined to include any municipality, any school district, any local benefit district such as a sewer, water or fire district, and any public benefit corporation (General Construction Law § 66). An action may not be maintained against a public corporation or against any officer, appointee or employee of a public corporation to recover damages alleged to have been sustained by reason of the negligence or wrongful act of the defendant unless a notice of claim is served within 90 days after the claim arose or, in the case of wrongful death, 90 days from the appointment of a representative of a decedent's estate (General Municipal Law §§ 50-e, 50-i; *see* Civil Practice and Procedure, V.B.)

D. Notice of defect

Generally, in the absence of a statute imposing absolute liability, a municipality may not be held liable for injury resulting from negligence or wrongdoing which it has not itself created or authorized, unless it had actual knowledge or notice of the defective condition causing the injury for a sufficient length of time before the accident to have remedied the condition or to have taken other precautions to guard against injury (*Cohen v City of New York*, 204 NY 424 [1912]). By statute, notice of the defective condition of a street, sidewalk or similar thoroughfare is made a prerequisite to the imposition of liability on a second-class city (Second Class Cities Law § 244), village (CPLR 9804; Village Law § 6-628), town (Town Law § 65-a) or county (Highway Law § 139) for injuries to persons or property allegedly caused thereby. Such notice may also be required by local laws (*See e.g.*, *Dabbs v City of Peekskill*, 178 AD2d 577 [2d Dept 1991]), and is mandated in New York City (New York City Administrative Code § 7-201[c] [2]).

Prior notice has also been made a prerequisite to recovery against a municipal corporation for injuries arising from the operation of a snowmobile caused by an unsafe, dangerous or obstructed condition on a highway, bridge or culvert (General Municipal Law § 71-b [1]).

TRUSTS, WILLS AND ESTATES

I. Intestate Succession

A. In General: EPTL 4-1.1; Abandoned Property Law § 1215

Property not disposed of by will is distributed by intestacy pursuant to EPTL 4-1.1.

If the decedent is survived by:

- Spouse and issue, $50,000 and one-half of the residue is distributed to the spouse and the remainder is distributed to the issue by representation ([a] [1]; *see* Trusts, Wills and Estates II.E.7);
- A spouse and no issue, the whole is distributed to the spouse ([a] [2]);
- Issue and no spouse, the whole is distributed to issue, by representation ([a] [3]);
- Parent(s) but no spouse or issue, the whole is distributed to the parent(s) ([a] [4]);
- No spouse, issue or parent, the whole is distributed to the issue of parent(s) (by representation) ([a] [5]).

If grandparents or their issue are the only survivors, one-half the estate goes to the paternal grandparents or their issue, by representation, and the other half to the maternal grandparents or their issue, by representation (EPTL 4-1.1 [a] [6]). For purposes of this distribution by representation, the issue of grandparents includes only children (i.e., aunts and uncles of the decedent) and grandchildren (i.e, first cousins of the decedent).

If no children or grandchildren of the decedent's grandparents survive the decedent, the estate passes one-half to the great-grandchildren of the maternal grandparents (i.e., second cousins of the decedent), per capita, and one-half to the great-grandchildren of the paternal grandparents, per capita, and if no great-grandchildren on one side, all to the great-grandchildren on the other side (EPTL 4-1.1 [a] [7]). A distribution of property "per capita" means in equal shares (EPTL 1-2.11).

"Issue" as the term is used above refers to descendants in any degree from a common ancestor (i.e., children, grandchildren, great-grandchildren) and includes adopted children and their issue (EPTL 1-2.10). Under a by-representation distribution, issue of deceased issue take an equal share with the other survivors at their level. For example, if property passes by representation to a decedent's issue and the decedent is survived by children A and B, and by grandchildren G-1 and G-2 from predeceased child C, and by grandchild G-3 from predeceased child D, then children A and B each get one-fourth of the estate, and the other half is divided evenly (one-sixth of the estate each) among grandchildren G-1, G-2 and G-3.

Decedent's relatives of the half-blood (those sharing only one biological parent) are treated as if they were relatives of the whole blood (EPTL 4-1.1 [b]), and distributees of a decedent, conceived before the decedent's death but born alive thereafter, take as if they were born in the decedent's lifetime (EPTL 4-1.1 [c]).

See Matrimonial and Family Law, X.F. regarding the inheritance rights of adoptive parents and children.

If the decedent is not survived by any of the above-mentioned relatives, the estate escheats to the state (Abandoned Property Law § 1215).

B. Disqualification of parent, spouse: EPTL 4-1.4, 5-1.2

EPTL 4-1.4 disqualifies a parent from inheritance if the parent fails to support the child or abandons the child while the child is under the age of 21, whether or not the child dies before the age of 21. The Court of Appeals has defined abandonment as a "settled purpose to be rid of all parental obligations or to forego all parental rights" (*Matter of Susan W.*, 34 NY2d 76, 80 [1974]). A parent may regain the right to inherit if the parent resumes the parental relationship and duties and continues fulfilling them until the death of the child (EPTL 4-1.4 [a] [1]).

A spouse is disqualified from sharing in intestacy if, among other things, the marriage was void under the Domestic Relations Law, the parties were legally separated or divorced under a final decree, or the surviving spouse has abandoned or refused to support the deceased spouse and such abandonment or refusal to support continues through the time of death (EPTL 5-1.2).

C. Non-marital children: EPTL 4-1.2

Generally, a non-marital child is the legitimate child of, and has full inheritance rights from, the mother and her family. A non-marital child is the legitimate child of, and may inherit from, the father or a non-gestating intended parent and the family of the father or such parent if parentage is established by one of the following methods:

- A court of competent jurisdiction has made an order of filiation or parenthood declaring parentage;
- The parentage of the child has been established through the execution of an acknowledgement of parentage pursuant to Public Health Law § 1235-b (*See* Matrimonial and Family Law, V.C.4.);
- The father files a witnessed and acknowledged affidavit of parentage with the Putative Father Registry; or
- Parentage is established by clear and convincing evidence, which may include a DNA test, or evidence that the father openly and notoriously acknowledged the child as his own.

The rights of non-marital children extend to their issue as well.

D. Child conceived after parent's death: EPTL 4-1.3

EPTL section 4-1.3 provides rights to children conceived from the genetic material of a deceased individual who is an intended parent, that is, an individual who manifests the intent to be legally bound as the parent of a child resulting from assisted reproduction or a surrogacy agreement provided the intended parent meets certain statutory requirements (FCA 581-102; *see* Matrimonial and Family Law, V.C.2. & 3.). Under certain conditions, a child conceived using the genetic material of a deceased intended parent is a distributee of the intended parent and may be included in any disposition to a class described as "issue," "children," "descendants," "heirs," or any other term included in a will, trust, or other instrument created by the intended parent. Those conditions include that the intended parent must have created a written instrument within seven years of his or her death and said instrument must provide consent for the use of the intended parent's genetic material. The child must be conceived no later than 24 months after the intended parent's death or born no later than 33 months after the intended parent's death.

II. Wills

A. Execution requirements: EPTL 3-2.1, 3-2.2

Section 3-2.1 sets forth the formalities a testator must follow to execute a valid will. To be valid:

- A will must be signed at the end by the testator or, in the name of the testator, by a person on the testator's behalf in the presence of the testator and by the testator's direction, which person must also sign the person's own name and affix the person's name to the will, but may not be counted as one of the required witnesses;
- There must be at least two attesting witnesses;
- The testator may sign in the presence of the attesting witnesses, who see the testator sign, or the testator may acknowledge the testator's signature to each of them separately;
- The testator must declare to each of the attesting witnesses that the instrument the testator is signing or has signed is the testator's will; and
- The witnesses, within one 30-day period, must both attest the testator's signature, as affixed or acknowledged in their presence, and sign their names and affix their residence addresses at the end of the will in the testator's presence and at the testator's request.

A testator's signature includes any mark or sign placed upon the document by the testator with the intent to execute the document (*See Jackson v Jackson,* 39 NY 153 [1868]; *Matter of Irving,* 153 AD 728 [1st Dept 1912] aff'd. 207 NY 765 [1913]; *Will of Kenneally*, 139 Misc2d 198, 199 (Sur Ct, Nassau County 1988).

Under EPTL 3-2.2, except in limited circumstances, nuncupative (oral) and holographic (handwritten) wills are not valid in New York. The exceptions are that they are valid only for members of the armed forces while in actual service during a war or other armed conflict, persons who serve with or accompany an armed force in actual service during such war or other armed conflict, or mariners while at sea, and then only for limited periods of time.

B. Codicils: EPTL 3-2.1

For purposes of the EPTL, unless the context otherwise requires, the term "will" includes a codicil (EPTL 1-2.19 [b]). Consequently, execution of a codicil requires the same formalities as a will. If the codicil is not executed with the formalities of EPTL 3-2.1, it is ineffective and the will remains as originally executed (*e.g.*, *Matter of Est. of Levy*, 169 AD2d 923 [3d Dept 1991]).

C. Incorporation by reference

In New York, the doctrine of incorporation by reference is generally not recognized in relation to wills (*Booth v Baptist Church of Christ of Poughkeepsie,* 126 NY 215, 247-248 [1891]). That is, a will may not incorporate by reference any document that was not signed and attested with the formalities of EPTL 3-2.1. One major exception is that, under EPTL 3-3.7, a testator may direct in his or her will that the assets be poured over into a lifetime trust (*See* Trusts, Wills and Estates, V.B.4.).

D. Revocation

1. By physical act or subsequent writing: EPTL 3-4.1

A will can be revoked by another will; a writing of the testator clearly indicating an intention to effect such revocation, executed with the formalities prescribed by statute for the execution and attestation of a will; or by a physical act upon the original will such as:

- Burning,
- Tearing,
- Cutting,
- Cancelation (writing across words),
- Obliteration, or
- Other mutilation or destruction.

The testator may personally perform the physical act without the need for witnesses or may direct another person to do so in the testator's presence and in the presence of two witnesses other than the person performing the physical act. Whether a marking is sufficient to constitute revocation is a question of fact for the courts to decide.

In addition, a will may be revoked or altered by a nuncupative or holographic declaration of revocation by a person authorized to make a nuncupative or holographic will in the circumstances set forth in EPTL 3-2.2 (*See* Trusts, Wills and Estates, II.A.).

Revocation is effective only if intended by the testator. Revocation of a will also revokes the codicils to the revoked will.

2. Partial revocation: EPTL 3-4.1

A will may be partially revoked by another will or a writing executed and attested with the formalities of a will. The statute does not allow for partial revocation of a will by a physical act.

3. Proof of lost will, presumption of revocation: SCPA 1407

SCPA 1407 provides that a copy of a lost or destroyed will may be submitted for probate only if it is established that:

- The will has not been revoked,
- The will was properly executed, and
- "All of the provisions of the will [can be] clearly and distinctly proved by each of at least two credible witnesses or by a copy or draft of the will proved to be true and complete"

(*Matter of DiSiena*, 103 AD3d 1077 [3d Dept 2013]).

When a will previously executed cannot be found after the death of the testator, there is a strong presumption that it was revoked by destruction by the testator. A proponent of a lost or destroyed will has the burden of proof to show that the testator did not destroy the will with the intent to revoke it (*Id.*).

4. Revival of revoked wills: EPTL 3-4.6

If a testator executes a will that is revoked by a later will containing a revocation clause, the first will cannot be revived by the testator merely revoking the later will. A prior will or disposition may be revived by:

- Executing a codicil that incorporates the provisions of the will by reference,
- A writing executed and attested with will formalities declaring the revival of the old will, or
- Re-execution and re-attestation of the prior will in accordance with will formalities.

5. Dependent relative revocation

"The doctrine of dependent relative revocation may be simply stated by saying that where the intention to revoke a will is conditional and where the condition is not fulfilled, the revocation is not effective" (*Matter of Sharp*, 68 AD3d 1182 [3d Dept 2009]). The doctrine is usually applied where the testator cancels a will with the intent to make a new testamentary disposition, and the new disposition is not made or fails for some reason.

6. Revocation due to divorce: EPTL 5-1.4

All dispositions to a former spouse, including, but not limited to, dispositions by will, by powers of appointment, by beneficiary designations for securities, life insurance, pension or retirement benefits, or by revocable trust, including a Totten Trust, are revoked if the spouses are judicially separated, divorced or if their marriage is annulled or declared void or dissolved on the ground of absence (EPTL 5-1.4 [a]). The former spouse is treated as having predeceased the testator; thus, the revoked disposition passes to any alternative beneficiaries. Nominations of the former spouse to serve in any fiduciary or representative capacity are also revoked, and interests in property held between spouses as joint tenants with the right of survivorship are severed and transformed into a tenancy in common (EPTL 5-1.4 [a], [c]).

E. Construction problems

1. Lapsed legacies: EPTL 3-3.3, 3-3.4 (residue of a residue)

Under New York's anti-lapse statute, if a testator makes a disposition to the testator's brother, sister or issue in a will, and that beneficiary predeceases the testator, the disposition passes to the issue of the predeceased brother, sister or issue (EPTL 3-3.3). If the will was executed after August 31, 1992, the disposition passes by representation (EPTL 1-2.16; *see* Trusts, Wills and Estates, I.A.), otherwise it passes per stirpes (EPTL 1-2.14; *see* Trusts, Wills and Estates, II.E.7.).

Class gifts to issue, however, are not subject to the anti-lapse statute and are governed instead by EPTL 2-1.2, whereby a disposition to "issue" will pass by representation (effective August 31, 1992, *see* Trusts, Wills and Estates, II.E.7).

EPTL 3-3.4 provides that when a residuary disposition to two or more residuary beneficiaries is ineffective in part, the ineffective disposition will pass to the other residuary beneficiaries, ratably, unless the testator has provided otherwise or unless the anti-lapse statute applies to the lapsed portion.

2. Ademption: EPTL 3-4.2, 3-4.3, 3-4.5

Under the "identity" theory of ademption, when a testator makes a specific disposition of property and the property is not part of the estate at the testator's death, the disposition fails (*Matter of Astor*, 16 NY 9 [1857]; *Matter of Powers*, 166 AD2d 534 [2d Dept 1990]). Where specifically devised property changes form, however, the specific gift does not adeem. Specifically, EPTL 3–4.3 provides that:

> "[a] conveyance, settlement or other act of a testator by which an estate in his property, previously disposed of by will, is altered but not wholly divested does not revoke such disposition, but the estate in the property that remains in the testator passes to the beneficiaries pursuant to the disposition. However, any such conveyance, settlement or other act of the testator which is wholly inconsistent with such previous testamentary disposition revokes it."

Under section 3-4.2, if a decedent had entered into a contract to sell specifically disposed property but did not complete the sale before the decedent's death, the disposition is not adeemed, but passes to the beneficiary subject to the rights created by the contract.

Under section 3-4.5, if specifically disposed property is damaged or destroyed before the decedent's death and the insurance company reimburses the executor after the decedent's death, the beneficiary is entitled to the insurance proceeds.

3. Advancement: EPTL 2-1.5

Under the doctrine of advancement, a testator may satisfy part or all of a disposition or intestate share by making a lifetime gift to the beneficiary. The doctrine is limited to gifts that are accompanied by a writing, which must be executed contemporaneously with the gift and signed by the decedent, or acknowledged by the donee, stating that the donor intended the gift to be an advancement. The decedent must intend to substitute the gift for the donee's share of the estate.

4. Competency of attesting witness-beneficiary: EPTL 3-3.2

A disposition to an attesting witness is void unless there are two other disinterested attesting witnesses who are available to testify. However, an interested witness remains a competent witness and may be called to testify as to the validity of the will. If the interested witness is also an intestate distributee, the witness is entitled to receive the lesser of the witness's intestate share or the disposition made to the witness in the will.

5. Renunciation: EPTL 2-1.11

A person who renounces a disposition arising from the death of a decedent, whether by intestacy, by will or trust, by operation of law, or as a designated beneficiary, is considered to have predeceased the decedent. In order for the renunciation to be valid, it must be:

- In writing,
- Signed and acknowledged before a notary public,
- Filed with the appropriate court, and
- Accompanied by a separate affidavit stating that no consideration was received for the disclaimer from a person whose interest will be accelerated, unless such consideration has been authorized by the court.

A beneficiary must renounce a disposition within nine months of the effective date of the disposition, and the renunciation is irrevocable.

6. Abatement: EPTL 13-1.3

Funeral expenses, debts, taxes and administration expenses retain priority over dispositions under a will and distributions in intestacy. Unless otherwise provided by a testator, if the assets of the testator's estate are insufficient to pay all obligations of the estate and distributions under the will, the interests in the estate will abate in the following order:

- Distributive shares in property not disposed of by will,
- Residuary dispositions,
- General dispositions (EPTL 1-2.8), including demonstrative dispositions (EPTL 1-2.3) to the extent that the property or fund charged with a demonstrative disposition has adeemed,
- Specific dispositions (ratably) (EPTL 1-2.17), including demonstrative dispositions if the property or fund charged with a demonstrative disposition has not adeemed,

- Dispositions to the decedent's spouse that are eligible for the estate tax marital deduction.

The testator may, however, provide for a different order of abatement.

7. Gifts to classes, children and issue: EPTL 2-1.2, 2-1.3, 4-1.3

Section 2-1.2 provides that dispositions to issue will pass by representation if the instrument was created after August 31, 1992, unless the instrument provides otherwise (*See* Trust, Wills and Estates, I.). For instruments created prior to this date, dispositions to issue will pass per stirpes, unless the instrument provides otherwise. Under a per stirpes disposition, the issue of deceased issue take their parent's share. For example, if property is left to the decedent's issue and the decedent is survived by children A and B, and by grandchildren G-1 and G-2 from predeceased child C, and by grandchild G-3 from predeceased child D, then children A and B each get one-fourth of the estate, and grandchildren G-1 and G-2 would share one-fourth of the estate and grandchild G-3 would receive one-fourth of the estate.

Section 2-1.3 provides that when a testator disposes of property in favor of a class described as the testator's "issue," adopted (*See* Matrimonial and Family Law X.F.), posthumous (*See* Trusts, Wills and Estates, I.A.) and non-marital children (*See* Trusts, Wills and Estates, I.C.) are entitled to share in the disposition.

A genetic child may be included in any disposition to a class (EPTL 4-1.3; *see* Trusts, Wills and Estates, I.D.).

8. Adopted-out children: EPTL 1-2.10; DRL 117

Under DRL 117, adopted-out children are not the issue of their biological parents. Thus, as a general matter, an adopted-out child will not take in a class gift from a birth relative unless that child is "specifically named in a biological ancestor's will, or the gift is expressly made to issue including those adopted out of the family" (*Matter of Best*, 66 NY2d 151, 156 [1985], *cert denied sub nom McCollum v Read*, 475 US 1083 [1986]).

An adopted-out child may, however, share in a class gift to "issue" of the child's biological family if the testator or grantor is the child's grandparent or a descendant of the grandparent (aunt, uncle, cousin, etc.) and the adoptive parent is a stepparent, a grandparent or a descendant of the grandparent (DRL 117).

F. Will contests

1. Due execution: EPTL 3-2.1

See Trusts, Wills and Estates II.A. for the execution requirements. The proponent of the will has the burden of proving due execution by a preponderance of the evidence (*Matter of Halpern,* 76 AD3d 429 [1st Dept 2010]). There is a rebuttable presumption that if an attorney supervises the execution ceremony, the requirements of EPTL 3-2.1 have been met (*See Matter of Kindberg,* 207 NY 220 [1912]; *Matter of Hedges,* 100 AD2d 586 [2d Dept 1984]).

2. Testamentary capacity: EPTL 3-1.1

Under EPTL 3-1.1, "[e]very person eighteen years of age or over, of sound mind and memory, may by will dispose of real and personal property and exercise a power to appoint such property."

The proponent of the will has the burden of proving that the testator possessed testamentary capacity, and the courts will look to whether the testator:

- Understood the nature and consequences of executing a will,
- Knew the nature and extent of the property that the testator was disposing of, and
- Knew those who would be considered the natural objects of the testator's bounty and the testator's relations to them

(Matter of Kumstar, 66 NY2d 691, 692 [1985]).

3. Undue influence

Unlike due execution and testamentary capacity, the objectant has the burden of proving undue influence (*See In re Goldin's Will*, 90 NYS2d 601, 603 [Sur Ct, Erie County 1949]). The objectant must "show that the influencing party's actions are so pervasive that the will is actually that of the influencer, not that of the decedent" (*Matter of Prevratil*, 121 AD3d 137, 141-142 [3d Dept 2014], quoting *Matter of Malone*, 46 AD3d 975, 977 [3d Dept 2007]). "[T]he influence exercised [must amount] to a moral coercion, which restrained independent action and destroyed free agency, or which, by importunity which could not be resisted, constrained the testator to do that which was against [the testator's] free will and desire, but which [the testator] was unable to refuse or too weak to resist" (*Matter of Walther*, 6 NY2d 49, 53 [1959], quoting *Children's Aid Soc. of New York v Loveridge*, 70 NY 387 [1877]).

4. Fraud

To prove fraud, it must be shown that "the proponent knowingly made a false statement that caused decedent to execute a will that disposed of [decedent's] property in a manner different from the disposition [decedent] would have made in the absence of that statement" (*Matter of Clapper*, 279 AD2d 730, 732 [3d Dept 2001], quoting *Matter of Coniglio,* 242 AD2d 901, 902 [4th Dept 1997]). The objectant has the burden of establishing the existence of fraud (*Clapper,* 279 AD2d at 732).

5. Mistake

A will is entitled to probate even if the decedent was mistaken concerning extraneous facts which might otherwise have caused the decedent to make a different disposition, unless the mistake of fact was the product of undue influence (*Matter of Young*, 289 AD2d 725 [3d Dept 2001]).

6. No-contest clauses: EPTL 3-3.5 (b)

A testator may include in a will an "in terrorem" or no-contest clause, which prevents a disposition from taking effect if the will is contested by the beneficiary, even if the beneficiary has probable cause for the contest. Such a provision will be enforced, but will not be considered as violated if:

- A beneficiary objects, based on probable cause, on the grounds of forgery or revocation by a later will;
- A guardian contests on behalf of an infant beneficiary;
- A beneficiary objects to the court's jurisdiction, refuses to join in the probate petition, or refuses to waive service of a citation;
- A beneficiary provides to the court or another party information pertinent to the probate of the will;
- A beneficiary conducts preliminary examinations under SCPA 1404 to evaluate the merits of the beneficiary's possible objections; or
- A beneficiary institutes, joins or acquiesces in a proceeding for the construction of any provision in the will.

7. Standing to contest: SCPA 1410

A person has standing to contest probate of a will if probate would adversely affect the beneficiary's pecuniary interests (*See e.g., Matter of Silverman*, 91 Misc2d 125 (Surr Ct, New York County 1977). For instance, a person has standing to contest a will if the person is a distributee[14] who is not a named beneficiary in the will, the person would receive more in intestacy than under the will, or the person is disinherited from an earlier will or is entitled to less than under an earlier will.

G. Non-probate transfers

1. Inter vivos gifts

A valid inter vivos gift requires:

- Intent on the part of the donor to make a present transfer;
- Delivery of the gift, either actual or constructive, to the donee; and
- Acceptance by the donee

(*Gruen v Gruen*, 68 NY2d 48 [1986]). The proponent of a gift has the burden of proving each of these elements by clear and convincing evidence (*Id.*).

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[14] A distributee is defined as a person entitled to inherit by intestacy pursuant to EPTL 4-1.1 (EPTL 1-2.5).

2. Concurrent estates: EPTL 6-2.1, 6-2.2

Under EPTL 6-2.1, property can be owned by more than one person as:

- Joint tenants,
- Tenants in common, or
- Tenants by the entirety but only if real property, including cooperative apartment shares and leases.

See Real Property, IV.A for the attributes and presumptions regarding concurrent estates.

3. Totten Trusts: EPTL 7-5.2

A Totten Trust (*Estate of Totten*, 179 NY 112 [1904]) is a bank account in the name of the decedent payable on the decedent's death to a named beneficiary. The beneficiary has no vested right in the trust, only an expectancy that the beneficiary might receive the trust in the future. The creator of a Totten Trust may revoke or modify it during the creator's lifetime or by will, in which case the will must describe the account as being in trust for a named beneficiary in a named financial institution. The will need not mention an intent to revoke or modify the trust, but must dispose of part or the whole of the trust account in order to effect a revocation or modification of the trust.

4. Transfer on death brokerage accounts: EPTL art. 13, part 4

Under the Transfer-on-Death Security Registration Act, an owner of securities can register them in the owner's name with a designated beneficiary to take upon the owner's death.

5. Joint bank accounts: Banking Law § 675

The deposit of funds in a bank account in the name of the depositor and another person and in form to be paid or delivered to either, or the survivor of them, creates prima facie evidence of intent to create a joint tenancy with the right of survivorship. This presumption can be rebutted by providing direct proof that no joint tenancy was intended or substantial circumstantial proof that the joint account had been opened for convenience only. The burden of proof is on the individual challenging title vesting in the survivor.

Upon creation of a joint account, each tenant has a present, unconditional property interest in an undivided one-half of the moneys deposited. Either joint tenant has the right to withdraw and use his or her one-half interest in the account. If one joint tenant withdraws more than that amount, the other joint tenant during the lifetime of both may sue to recover the excess withdrawal, and right of survivorship to the half-interest of the other joint tenant is destroyed (*Matter of Kleinberg v Heller,* 38 NY2d 836 [1976, Fuchsberg, J., concurring]).

6. Life insurance: EPTL 13-3.2

Life insurance policy proceeds ordinarily do not pass under a will or in intestacy, but rather by beneficiary designation. Thus, the disposition of those proceeds is not affected by laws governing the transfer of property by will or intestacy unless the insured fails to properly designate a beneficiary, no named beneficiary survives the insured, or the insured expressly designates his or her estate or personal representative(s) as beneficiary. Designation of a beneficiary must be done by a signed writing. The insurance carrier may also set forth the rules in its contract on how to designate a beneficiary, and the carrier must agree to the designation of the beneficiary.

7. Retirement benefits: EPTL 13-3.2

No statute or laws governing the transfer of property by will, gift or intestacy may impair or defeat the rights of beneficiaries of pension, retirement, profit-sharing or other specified benefit plans. Thus, the right of a person entitled to receive money or other property pursuant to such a plan may not be defeated by a testamentary disposition. Rights under a retirement plan are, however, contractual rights and therefore limited by the provisions of the contract.

8. Lifetime Trusts (*See* Trusts and Estates, V.A.)

III. Family Protection

A. Family exemption: EPTL 5-3.1

If a decedent leaves a surviving spouse or children under the age of 21, the following items of property are not assets of the estate but vest in the surviving spouse or in such children if there is no surviving spouse:

- All housekeeping utensils, musical instruments, sewing machine, jewelry unless disposed of in the will, clothing, household furniture and appliances, electronic and photographic devices, and fuel for personal use, up to $20,000 in value,
- The family bible or other religious books, family pictures, books, computer tapes, discs and software, DVDs, CDs, audio tapes, record albums, and other electronic storage devices, up to $2,500 in value,
- Domestic and farm animals with their necessary food for 60 days, farm machinery, one tractor and one lawn tractor, up to $20,000 in value,
- One motor vehicle not exceeding $25,000 in value, and
- Cash, bank accounts and marketable securities, up to $25,000 in value, unless needed to pay funeral expenses.

B. Spouse’s elective share and testamentary substitutes: EPTL 5-1.1-A, 5-1.2

In New York, a surviving spouse has the right to take $50,000 or one-third of the net estate, whichever is greater (EPTL 5-1.1-A). The net estate is based on date of death values and consists of:

- Property in the decedent's name that could pass under a will (net probate assets),
- Property that passes in intestacy,
- Testamentary substitutes, and
- Debts owed to decedent,
- Minus debts of the decedent, administration expenses and reasonable funeral expenses.

Testamentary substitutes include:

- Gifts causa mortis;
- Totten Trusts (*See* Trusts, Wills and Estates, II.G.3.);
- Jointly owned property, including joint tenancies, tenancies by the entirety, and joint bank accounts, generally to the extent of decedent's contribution, but if the decedent's spouse is the other owner, the decedent's contribution is conclusively presumed to be one-half;
- Survivor bank accounts and payable-on-death securities;
- Benefits payable under any employee benefit plan, including any thrift, savings, retirement, pension, deferred compensation, death benefit, stock bonus or profit sharing plan, account, arrangement, system or trust (if the plan is a qualified pension plan for which a distribution to the spouse as a joint and survivor annuity is required under IRC 401, only one-half is considered a testamentary substitute);
- Lifetime transfers, in trust or otherwise, in which decedent retained until the time of the decedent's death (i) the possession or enjoyment of, or the right to income from the property except to the extent such disposition was for adequate consideration, or (ii) the power to revoke such disposition or a power to consume, invade or dispose of the principal, or name new beneficiaries;
- Property over which decedent retained a presently exercisable general power of appointment; and
- Gifts made within one year of death but excluding any portion not subject to the federal gift tax pursuant to the annual exclusion.

Life insurance contracts are not considered testamentary substitutes, but annuities are (*See Estate of Zuppa,* 48 AD3d 1036 [4th Dept. 2008]).

To the extent the elective share exceeds the value of all interests received by the spouse by intestacy, testamentary substitutes, and bequests under the will, it is paid ratably, unless otherwise directed by the will, by the decedent's other intestate beneficiaries, beneficiaries under the will, and beneficiaries of testamentary substitutes.

The surviving spouse must exercise the right of election within six months from the date of issuance of letters testamentary or of administration, but no later than two years after the decedent's death. A court may in its discretion extend these time periods upon a showing of good cause.

The right of election may be waived or released by an agreement that is written, signed, and acknowledged before a notary public. The waiver or release may be executed before or after the marriage, be in whole or in part, be with or without consideration, and be absolute or conditional.

A surviving spouse is disqualified from sharing in a wrongful death recovery, intestacy, the family exemption or electing against the will under certain circumstances, including where there is a final judgment of divorce or separation, the surviving spouse abandoned the decedent and the abandonment continued until the decedent's death, or the surviving spouse failed or refused to support the decedent (EPTL 5-1.2).

C. Share of after-born or pretermitted child: EPTL 5-3.2

EPTL 5-3.2 provides that a child born after the execution of the testator's will shall succeed to a portion of the testator's estate if the after-born child was left unprovided for by any settlement such as by life insurance, a joint bank account or any other assets with a transfer on death designation, or without any mention in the will.

If the testator had no child living when the testator executed the testator's last will, the after-born child succeeds to the portion of such testator's estate as would have passed to such child had the testator died intestate.

If the testator had one or more children living when the testator executed the testator's last will and no provision is made therein for any such child, an after-born child is not entitled to share in the testator's estate.

If the testator had one or more children living when the testator executed the testator's last will, and provision is made therein for one or more of such children, an after-born child is entitled to share in the testator's estate, as follows:

- The portion of the testator's estate in which the after-born child may share is limited to the disposition made to children under the will;

- The after-born child shall receive such share of the testator's estate as the child would have received had the testator included all after-born children with the children upon whom benefits were conferred under the will, and given an equal share of the estate to each such child with each child upon whom benefits were conferred contributing ratably to the share of the after-born children;

- If the intention of the testator was to make a limited provision to be applied only to the testator's children living at the time the will was executed (for example, "I give each of my children $1,000 because they have provided me with little comfort"), the after-born child succeeds to the portion of such testator's estate as would have passed to such child had the testator died intestate.

IV. Health Care Proxies and Powers of Attorney

A. Health Care Proxies: Public Health Law §§ 2980, 2981, 2982, 2985

Public Health Law § 2981 authorizes any competent adult to appoint a health care agent by a health care proxy that is signed and dated by the adult in the presence of two adult witnesses, who must also sign and who cannot be the appointed agent. The witnessing of a health care proxy may be done using audio-video technology, for either or both witnesses, if the procedural requirements set forth in Section 2981 for remote witnessing are met. The agent's authority commences upon a determination that the adult lacks capacity to make health care decisions.

The agent's decisions must be consistent with the known wishes of the principal (i.e., by the adult having executed a living will or having expressed such beliefs) including religious and moral beliefs (Public Health Law § 2982). If the principal's wishes are not reasonably known or cannot reasonably be determined, the agent may act in accordance with the adult's best interests. However, if the adult's wishes regarding the administration of artificial nutrition and hydration are not reasonably known and cannot with reasonable diligence be ascertained, the agent does not have any authority to make decisions regarding those measures.

The proxy may be revoked by notifying the agent or a health care provider orally or in writing, by any other act evidencing a specific intent, by execution of a subsequent health care proxy, or by divorce or legal separation from the agent unless the principal specifies otherwise (Public Health Law § 2985).

B. Power of Attorney: GOL art 5, Part 15

1. Statutory and non-statutory forms

A power of attorney (POA) is a document by which a person (the principal) gives authority to one or more other persons (the agent or agents) to perform certain tasks or conduct business on the principal's behalf. Except for a POA given primarily for a business or commercial purpose and other specific-purpose POAs enumerated in GOL 5-1501C, GOL Art. 5, Part 15 applies to all statutory short form POAs and non-statutory POAs.

A POA is durable unless it expressly provides that it is terminated by the incapacity of the principal (GOL 5-1501A [1]). A principal becomes incapacitated when the principal no longer has the ability to comprehend the nature and consequences of (1) the act of executing and granting, revoking, amending or modifying a POA, (2) any provision in a POA, or (3) the authority of any person to act as agent under a POA (GOL 5-1501 [c], [f]).

A POA must be signed, dated and duly acknowledged by both the principal and the agent and also be witnessed by two persons who are not named in the instrument as agents or as permissible recipients of gifts (GOL 5-1501B [1], [b], [c]). It also must include language that substantially conforms to statutorily provided language for "Caution to the Principal" and "Important Information for the Agent" (GOL 5-1501B [1], [d]). The agent does not have to sign the POA at the same time as the principal. The witnesses must sign in the presence of the principal, and one of the witnesses may be the person who takes the acknowledgment of the principal.

For a POA to be a statutory short-form POA it must substantially conform to the form set forth in GOL 15-1513. The statutory form contains a list of the types of transactions and matters over which the principal may grant authority to the agent (listed as "(A)" through "(O)," with each item in the list being extensively further defined by statute (GOL 5-1502A - 5-1502N, inclusive). For example, item (D) is "banking transactions," and GOL 5-1502D includes 17 numbered paragraphs explaining what is meant by "banking transactions."

In order for the principal to grant the agent a listed authority, the principal must initial the bracket preceding that specific authority. In lieu of initialing multiple brackets, the principal need only initial the bracket for (P) and in the provided space list the items to be included, which may be all of A through O. Placing an "X" or other mark rather than the principal's initials is invalid and does not serve to grant to the agent any authority unless a principal lacks capacity for a standard signature and routinely signs his or her name with such a mark (*Matter of Marriott*, 86 AD3d 943 [4th Dept 2011]).

A statutory short form POA may contain modifications or additions (GOL 5-1503). One modification to be considered is to expressly give the agent access to the principal's digital assets, including electronic files and e-mail communications (*See* EPTL Art. 13-A). The authority granted by "(L) retirement benefit transactions" does not include the authority to change the designation of a beneficiary of a retirement benefit or plan, unless the authority to make such change is expressly set forth in the Modifications section (GOL 5-1502L [1]). The authority granted by "(D) banking transactions" does not include the authority to add or delete a joint tenant on a bank account or to change the beneficiary of a Totten Trust account, unless the authority to make such change is expressly set forth in the Modifications section (GOL 5-1502D [1]).

2. Agent's authority to make gifts

Under the statutory short-form POA, an agent may only make gifts that the principal customarily has made to individuals, including the agent, and charitable organizations up to $5,000 in the aggregate in any calendar year. If the principal wishes to grant an agent authority to make other gifts or gifts in excess of an annual total of $5,000, the principal must: (1) initial a statement in the statutory short-form POA; and (2) expressly grant such authorization in the Modifications section.

3. Standard of care

The standard of care to be exercised by the agent is defined as "observ[ing] the standard of care that would be observed by a prudent person dealing with property of another" and exercising a fiduciary duty to act in the best interest of the principal (GOL 5-1505). An agent's fiduciary duties include:

- Acting according to any instructions from the principal or, where there are no instructions, in the best interest of the principal, and to avoid conflicts of interest;
- Keeping the principal's property separate and distinct from any other property owned or controlled by the agent;

- Keeping a record of all receipts, disbursements, and transactions entered into by the agent on behalf of the principal and making such record and power of attorney available to the principal or to third parties at the request of the principal; and
- Not making gifts to oneself without such authority being expressly granted.

4. Compensation of agent

The agent is entitled to be reimbursed from the assets of the principal for reasonable expenses. If the principal wants the agent to be compensated for services rendered, the principal must set forth appropriate provisions in the Modifications section.

5. Acceptance and reliance

No third party doing business in New York may refuse without reasonable cause to honor a properly acknowledged and witnessed POA or an attorney-certified copy pursuant to CPLR 2015. The third party has ten days to either accept or reject the POA, and if rejecting, the third party must do so in a writing mailed to the principal and the agent. GOL 5-1504 (4) (b) provides that if a special proceeding is brought to compel a third party to honor a POA, the court may award damages, including attorney fees.

6. Termination

The power of attorney terminates when:

- The principal dies;
- The principal becomes incapacitated, if the power of attorney is not durable;
- The principal revokes the power of attorney;
- The principal revokes the agent's authority and there is no co-agent or successor agent;
- The agent dies, becomes incapacitated or resigns and there is no co-agent or successor agent;
- The purpose of the power of attorney is accomplished; or
- A court order revokes the power of attorney

(GOL 5-1511 [1]).

The power of attorney also terminates when the authority of the agent terminates, which can occur when:

- The principal revokes the agent's authority;
- The agent dies, becomes incapacitated or resigns;
- The power of attorney terminates; or
- The agent's marriage to the principal is terminated by divorce or annulment

(GOL 5-1511 [2]).

V. Trusts

A. Creation of lifetime trusts, including trust res, beneficiary, trustee, valid purposes and execution requirements: EPTL 3-3.7, 6-2.2, 7-1.1, 7-1.4, 7-1.14, 7-1.15, 7-1.17, 7-1.18, 7-2.3

A trust of real or personal property may be created for any lawful purpose (EPTL 7-1.4). A trust has three parties, its creator, the trustee and the beneficiary (*Brown v Spohr,* 180 NY 201 [1904]). A trust is not invalid, or terminated by a merger of interests, because a person, including but not limited to the creator of the trust, is or may become the sole trustee and the sole holder of a present beneficial interest therein, provided that one or more other persons hold a beneficial interest therein (EPTL 7-1.1).

EPTL 7-1.14 provides that any person or entity may create a lifetime trust, and that a natural person creating a trust must be at least 18 years of age. The creator must intend to create a trust, and the trust must have a designated trustee, at least one definite and ascertainable beneficiary who is not the trustee, a fund or other property designated as the trust corpus, and delivery of the corpus to the trustee (*Brown,* 180 NY at 201).

Any kind of estate in property may be disposed of by lifetime trust (EPTL 7-1.15). Pursuant to EPTL 7-1.17 (a), a lifetime trust must be:

- In writing;
- Executed by the creator of the trust and at least one trustee (unless the creator is the sole trustee; and
- Acknowledged in the same manner as required for the recording of a deed (*See* Real Property Law, IV.C.) or executed in the presence of two witnesses, who must then sign it.

A trust is not valid until funded, with the exception of certain life insurance and pension trusts (EPTL § 13-3.3 [a] [1]), and pour-over trusts (EPTL 3-3.7) (*See* Trusts, Wills and Estates, V.B.4.; *Matter of Sackler*, 145 Misc2d 950 [Sur Ct, Nassau County 1989]). In order to be sufficiently funded, assets must be transferred by appropriate documentation, such as recording a deed or completing the registration of a stock certificate (EPTL 7-1.18). If the transfer is not recordable or registrable, there must be a written assignment describing the asset with particularity (*Id.*).

The trustee holds legal title to trust property (EPTL 7-2.1 [a]), and co-trustees share legal title jointly with right of survivorship (EPTL 6-2.2 [e]). When a sole trustee dies, the trust property vests in a court, which can then appoint a successor trustee, unless the trust otherwise provides (EPTL 7-2.3).

B. Types of trusts

1. Revocable: EPTL 7-1.16, 7-1.17

If a lifetime trust provides that it is revocable, a grantor may amend or revoke the trust in a writing that is executed and acknowledged with the same formalities as the initial trust instrument (EPTL 7-1.17 [b]). The governing instrument can eliminate the need for formalities, but all revocations or modifications must be in writing (*Id.*). Additionally, the grantor may revoke or amend a lifetime trust by an express provision in the grantor's will which specifically refers to the trust or the provision to be amended (EPTL 7-1.16).

2. Irrevocable: EPTL 7-1.9, 7-1.16

A lifetime trust is irrevocable unless the trust instrument expressly provides that it is revocable (EPTL 7-1.16). Notwithstanding, an irrevocable trust may be revoked or amended pursuant to EPTL 7-1.9 (*See* Trusts, Wills and Estates, V.D.).

3. Testamentary

A testamentary trust is a trust created in a will. Consequently, a testamentary trust only becomes effective upon the death of the testator.

4. Pour-over: EPTL 3-3.7

A testator may direct in a will that all or part of the testator's assets be poured over into a lifetime trust. This pour-over trust instrument need not be executed with the same formalities as a will and may be amendable or revocable, but it must be in existence before or be executed contemporaneously with the will. The trust instrument must be in writing, signed by the creator and, unless the creator is the sole trustee, by at least one trustee, and either acknowledged like a deed or signed by two witnesses.

5. Charitable, including cy pres: EPTL 8-1.1

In New York, a disposition for charitable purposes is valid despite the lack of a definite or ascertainable beneficiary. The state Attorney General represents beneficiaries of charitable trusts. A charitable trust will not fail for lack of a trustee. Rather, title will pass to the court with jurisdiction to appoint a trustee.

A charitable trust may be reformed under the cy pres doctrine. In order to reform the charitable trust, a court must find the following three conditions:

- The gift or trust is charitable in nature;
- The language of the will or trust instrument indicates that the donor demonstrated a general, rather than specific, charitable intent (*See e.g., Application of Syracuse University*, 3 NY2d 665 [1958], *Matter of Potter's Will*, 307 NY 504 [1954]); and

- The particular purpose for which the gift or trust was created has failed, or has become impossible or impracticable to achieve.

C. Alienability of trust interests and spendthrift trust provisions, rights of creditors: EPTL 7-1.5, 7-1.6, 7-3.1, 7-3.4; CPLR 5201, 5205

In New York, income interests in a trust are not alienable and are therefore beyond the reach of creditors (i.e., spendthrift protection), unless the trust instrument expressly makes them alienable (EPTL 7-1.5). For example, if a trust directs income to A for life, remainder to B, A may not sell or assign A's income interest, and A's creditors cannot reach the income, unless the trust instrument provides otherwise. Notwithstanding spendthrift protection, unless otherwise expressly provided in the trust instrument, an income beneficiary may assign all or part of the beneficiary's income to a spouse or children the beneficiary is legally obligated to support, or income over $10,000 per year to or for the benefit of the spouse, issue, ancestors, siblings, uncles, aunts, nephews or nieces of the beneficiary pursuant to an acknowledged document (EPTL 7-1.5 [b]). In addition, EPTL 7-1.6 provides that, unless otherwise expressly provided in the trust instrument, a court may in its discretion make an allowance from principal to any income beneficiary for the beneficiary's support and education.

Remainder interests are freely alienable unless by specific provision in the trust the grantor makes the trust remainder inalienable (EPTL 7-1.5 [a]). In the example above, B can sell B's remainder interest during B's lifetime or bequeath it by will, even if the remainder interest is contingent.

Creditors of the creator and income beneficiaries have certain statutory rights. For example, a disposition in trust by a creator for the creator's own benefit (a self-settled trust) is void against existing or subsequent creditors (EPTL 7-3.1). CPLR 5205 (d) allows creditors to reach 10% of the income from a trust, and pursuant to EPTL 7-3.4, unless a trust requires the accumulation of income, a creditor may levy against the income in excess of what is necessary for the income beneficiary's support and education.

D. Amendment, revocation and termination: EPTL 7-1.9, 7-1.16, 7-1.17, 7-1.19, 7-2.2

If a trust is revocable (*See* EPTL 7.1.16, 7-1.17 [a], *see* Trusts, Wills and Estates, V.B.1), the creator can revoke the trust without the consent of the beneficiaries by written notice of revocation delivered to at least one other trustee within a reasonable time if the person executing the revocation is not the sole trustee (EPTL 7-1.17 [b]).

To amend or revoke a trust that is irrevocable, the grantor must execute an instrument in writing and acknowledged or proved in the manner required for the recording of a conveyance of real property, with the consent of all living beneficiaries, executed in like manner (EPTL 7-1.9). Consent of a trustee is not needed unless required by the trust instrument (*Elser v Meyer*, 29 AD3d 580 [2d Dept 2006]), and the consent of an unborn child is not needed to revoke or amend a trust (*Matter of Peabody [Chase Manhattan Bank-Holtzmann]*, 5 NY2d 541 [1959]).

A court may terminate a lifetime or testamentary trust, but not a wholly charitable trust, upon application by a trustee or beneficiary, if it finds that:

- Continuation of the trust is economically impracticable,
- The express terms of the disposing instrument do not prohibit its early termination, and
- Such termination would not defeat the specified purpose of the trust and would be in the best interests of the beneficiaries

(EPTL 7-1.19).

When the purpose of a trust ceases, the trust terminates (*e.g., Hopkins v Kent*, 145 NY 363 [1895]), and the estate of the trustee also ceases (EPTL 7-2.2).

VI. Rule Against Perpetuities: EPTL 9-1.1, 9-1.2, 9-1.3

The rule against perpetuities limits the ability of owners to control future disposition of their property. In New York, the rule against perpetuities, which applies to both real and personal property, but not to charities, involves applying two rules to determine the validity of a disposition of property: (1) the suspension of alienation rule and (2) the remoteness of the vesting rule.

Under the suspension of alienation rule, any estate in which the conveying instrument suspends the absolute power of alienation for longer than lives in being at the creation of the estate plus 21 years is deemed void (EPTL 9-1.1 [a] [2]). Lives in being include a child conceived before the creation of the estate but born thereafter.

Under the remoteness of vesting rule, "[n]o estate in property shall be valid unless it must vest, if at all, not later than [21] years after one or more lives in being at the creation of the estate and any period of gestation involved" (EPTL 9.1.1 [b]). Beneficiaries of a trust must be definite and ascertainable within the perpetuities period.

Pursuant to EPTL 9-1.2 (Reduction of Age Contingency), where an estate would be invalid under the rule against perpetuities because it depends on a person attaining or failing to attain an age in excess of 21 years, the age contingency is reduced to 21 years for the person subject to that contingency. For example, if the grantor provides "to A for life, remainder to A's children who shall reach the age of 30," the remainder interest is invalid (because A could have a child after creation of the interest who could reach the age of 30 more than 21 years after A's death). EPTL 9-1.2 permits the age contingency to be reduced to 21 as to those beneficiaries whose interests would otherwise be invalidated.

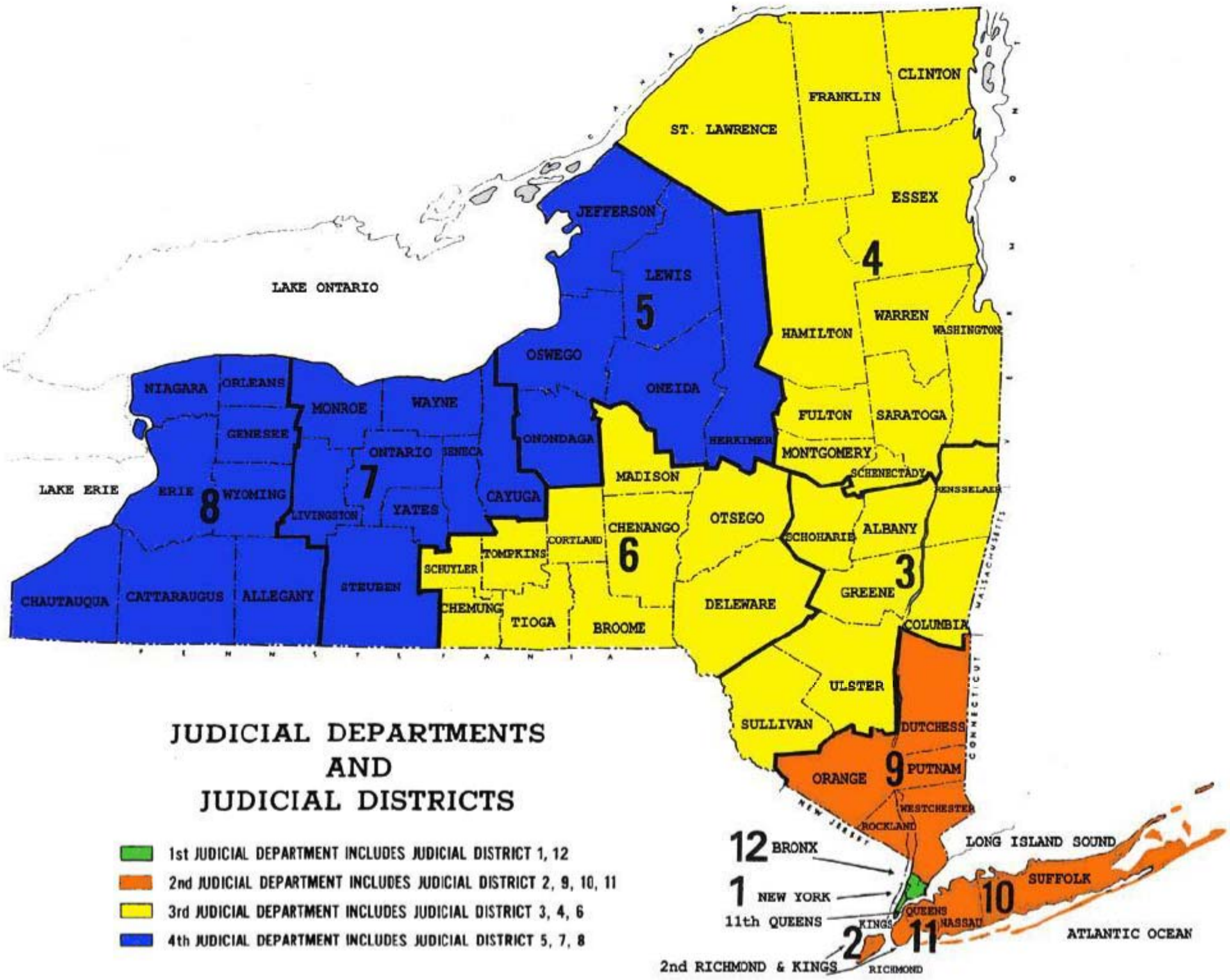
APPENDIX A

APPELLATE DIVISIONS

There are four Appellate Divisions of the Supreme Court, one in each of the State's four Judicial Departments. These Courts resolve appeals from judgments or orders of the superior courts of original jurisdiction in civil and criminal cases, and review civil appeals taken from the Appellate Terms and the County Courts acting as appellate courts.

Judicial Departments			
First	**Second**	**Third**	**Fourth**
Bronx NY County	Dutchess Kings Nassau Orange Putnam Queens Richmond Rockland Suffolk Westchester	Albany Broome Chemung Chenango Clinton Columbia Cortland Delaware Essex Franklin Fulton Greene Hamilton Madison Montgomery Otsego Rensselaer St. Lawrence Saratoga Schenectady Schoharie Schuyler Sullivan Tioga Tompkins Ulster Warren Washington	Allegany Cattaraugus Cayuga Chautauqua Erie Genesee Herkimer Jefferson Lewis Livingston Monroe Niagara Oneida Onondaga Ontario Orleans Oswego Seneca Steuben Wayne Wyoming Yates

APPENDIX B



LAKE ONTARIO
LAKE ERIE
ST. LAWRENCE
FRANKLIN
CLINTON
ESSEX
4
JEFFERSON
LEWIS
5
HAMILTON
WARREN
WASHINGTON
OSWEGO
ONEIDA
NIAGARA
ORLEANS
MONROE
WAYNE
GENESEE
ONONDAGA
HERKIMER
FULTON
SARATOGA
ONTARIO
SENECA
MONTGOMERY
SCHENECTADY
ERIE
8
WYOMING
7
CAYUGA
MADISON
RENSSELAER
LIVINGSTON
YATES
OTSEGO
CHENANGO
SCHOHARIE
ALBANY
CORTLAND
TOMPKINS
6
SCHUYLER
3
GREENE
CHAUTAUQUA
CATTARAUGUS
ALLEGANY
STEUBEN
DELEWARE
CHEMUNG
TIOGA
BROOME
COLUMBIA
PENNSYLVANIA
ULSTER
MASSACHUSETTS
CONNECTICUT
SULLIVAN
DUTCHESS
JUDICIAL DEPARTMENTS
AND
JUDICIAL DISTRICTS
ORANGE
9
PUTNAM
NEW JERSEY
WESTCHESTER
ROCKLAND
12 BRONX
LONG ISLAND SOUND
1st JUDICIAL DEPARTMENT INCLUDES JUDICIAL DISTRICT 1, 12
2nd JUDICIAL DEPARTMENT INCLUDES JUDICIAL DISTRICT 2, 9, 10, 11
3rd JUDICIAL DEPARTMENT INCLUDES JUDICIAL DISTRICT 3, 4, 6
4th JUDICIAL DEPARTMENT INCLUDES JUDICIAL DISTRICT 5, 7, 8
1 NEW YORK
10
SUFFOLK
11th QUEENS
QUEENS
NASSAU
KINGS
2
11
ATLANTIC OCEAN
2nd RICHMOND & KINGS
RICHMOND

APPENDIX C

Acknowledgements, Affidavits, Verifications and Affirmations

Throughout these Course Materials there are references to acknowledgements, affidavits and verifications, all which involve a notary public or other official qualified to take an oath or acknowledgement.

Acknowledgement

An acknowledgement is a formal declaration before a duly authorized person by a person who has executed an instrument that such execution is his act and deed. A proper acknowledgment requires that: (1) the signer orally acknowledge to the notary public or other officer that the signed in fact signed the document (RPL 292); and (2) the notary or other official either actually know the identity of the signer or secure "satisfactory evidence" of identity ensuring that the signer was the person described in the document (RPL 303); and (3) the notary execute a certificate of acknowledgement (RPL 306, 309-a). It is not a sworn statement. The following is the standard form of acknowledgement provided in RPL 309-a (1) for a conveyance or other instrument in respect of real property:

STATE OF NEW YORK)
) ss.:
COUNTY OF ______________)

On the _____ day of ________________ in the year _____ , before me the undersigned, a Notary Public in and for said State, personally appeared______________________, personally known to me or proved to me on the basis of satisfactory evidence, to be the individual(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their capacity(ies), and that by his/her/their signature(s) on the instrument, the individual(s) or the person upon behalf of which the individual(s) acted, executed the instrument.

____
Notary Public

Affidavit (and jurat)

An affidavit is a signed statement, duly sworn to, by the signer, before a notary public or other person authorized to administer oaths. The county where the affidavit was sworn to should be accurately stated. The person making the affidavit must personally appear before the notary or other official and under oath state that what is contained in the affidavit is true. A standard form of an affidavit is:

(See next page)

STATE OF NEW YORK)
) ss.:
COUNTY OF ______________)
_____________________, being duly sworn, states:
1. (numbered paragraphs)

____
(Signature)

Sworn to before me
this __ day of ___________, 20__.

____
Notary Public

The "Sworn to before me" statement to be signed by the notary public is known as a jurat.

Verification

A verification is a statement under oath that a pleading is true to the knowledge of the person making the statement, who, if the party is an individual, is the individual, or if the party is a corporate or governmental entity, is an appropriate representative of the party (CPLR 3020). A standard form of a verification of a complaint is:

STATE OF NEW YORK)
) ss.:
COUNTY OF ______________)

_______(Name)_____________, being duly sworn, deposes and says: I am the plaintiff in the foregoing action; I have read the annexed Complaint, know the contents thereof and the same are true to my knowledge, except those matters therein which are stated to be alleged on information and belief, and as to those matters I believe them to be true.

____
(Signature)

Sworn to before me
this __ day of ___________, 20__.

____
Notary Public

Affirmation

An affirmation may be used in lieu of an affidavit in some circumstances. CPLR 2106 provides:

> The statement of any person wherever made, subscribed and affirmed by that person to be true under the penalties of perjury, may be used in an action in New York in lieu of and with the same force and effect as an affidavit. Such affirmation shall be in substantially the following form:
>
>> I affirm this ___ day of ______, ____, under the penalties of perjury under the laws of New York, which may include a fine or imprisonment, that the foregoing is true, and I understand that this document may be filed in an action or proceeding in a court of law.
>>
>> (Signature)